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NORTH CAROLINA REPORTS
VOL. 181

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1921

REPORTED BY
ROBERT C. STRONG

RALEIGH
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1 “ Eq.	“	36	“
2 “ “	“	37	“
3 “ “	“	38	“
4 “ “	“	39	“
5 “ “	“	40	“
6 “ “	“	41	“
7 “ “	“	42	“
8 “ “	“	43	“
Busbee Law	“	44	“
“ Eq.	“	45	“
1 Jones Law	“	46	“
2 “ “	“	47	“
3 “ “	“	48	“
4 “ “	“	49	“
5 “ “	“	50	“
6 “ “	“	51	“
7 “ “	“	52	“
8 “ “	“	53	“
1 “ Eq.	“	54	“
2 “ “	“	55	“
3 “ “	“	56	“
4 “ “	“	57	“
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OF THE

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SPRING TERM, 1921

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,	WILLIAM R. ALLEN,
WILLIAM A. HOKE,	W. P. STACY.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
J. Lloyd Horton	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
Woodus Kellum	Eighth	New Hanover.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
G. D. Bailey	Eighteenth	Transylvania.
Geo. M. Pritchard	Nineteenth	Madison.
Gilmer A. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

SPRING TERM, 1921

The following were licensed to practice law by the Supreme Court, Spring Term, 1921:

Allen, Thomas Whitmell	Raleigh.
Allen, William Reynolds, Jr.	Goldsboro.
Andrews, Robert McCants	Durham.
Austin, Horace Vernon	New London.
Berry, John Duncan	Raleigh.
Bivens, Jay	Aquadale.
Bland, Julian Addison	Raleigh.
Bone, Walter James	Rocky Mount.
Brantley, Dwight	Springhope.
Buie, Clifford Bennett	Bladenboro.
Burgess, John Robert	Columbus.
Butler, Lacy McDonald	Hayesville.
Campbell, Walter Lee	Norwood.
Carlyle, Frank Ertel	Lumberton.
Carr, Leo	Teachey.
Carswell, Guy Thomas	Wake Forest.
Carter, Rufus Roy	Holly Springs.
Cheek, Ernest Calvin	Durham.
Cunningham, Clayton Carlisle	Raleigh.
Currie, Ernest McArthur	Fayetteville.
Dickens, Wade Hampton	Enfield.
Edwards, Enos Tyler	Polkton.
Felts, William Roy	Mt. Airy.
Fortune, Charles Meriwether	Asheville.
Frazier, June Ernest	Asheboro.
Fulghum, James Spencer	Raleigh.
Fyne, Jacob Joseph	Raleigh.
Goodson, William Carl	Mt. Olive.
Gordon, Martin Luther	Nashville.
Grady, Charles Howard	Kenly.
Griffin, Lloyd Eldon	Edenton.
Hall, Avalon Evan	Winston-Salem.
Harris, William Durham	Sanford.
Hennessee, William Edward	Salisbury.
Hicks, Edison Thurston	Henderson.
Hicks, Jasper Benjamin	Henderson.
Isear, David Wesley	Wilson.

Jarvis, Hubert Clarence	Asheville.
Jones, Thomas Atkinson, Jr.	Asheville.
Klutz, Gill Wyley	Maiden.
Lisk, Merrill Cerdell	Mt. Airy.
Llewellyn, Clement Manly	Dobson.
McCullers, Edgar Warren	Clayton.
Martin, Mrs. Florence Collen	Asheville.
Moses, Talmage Owen	Springhope.
Narron, John Arthur	Smithfield.
Pangle, Thomas Ora	Dillsboro.
Pittman, James Carlton	Gates.
Pittman, William Gladstone	Gates.
Pritchett, John Albert	Rawlings, Va.
Proctor, Edward Knox	Lumberton.
Pruette, Shaw McDade	Charlotte.
Rand, Oliver Gray	Garner.
Rhodes, Hughes Jennings	New Bern.
Stevens, Henry Leonidas, Jr.	Warsaw.
Watkins, Richard Clyde	Raleigh.
Whitmire, Robert Lee	Hendersonville.
Willis, David Henry	Sealevel.
Womble, William Brantley	Cary.
Yelverton, William Bayard	Goldsboro.

Admitted under chapter 44, Public-Local Laws and Private Laws, Extra Session 1920:

Munday, George Brashears	Ohio.
Spence, Lebern S.	Indiana.
Starbuck, Victor Stanley	Florida.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1921

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	FALL TERM, 1921
First District	August 30
Second District	September 6
Third and Fourth Districts	September 13
Fifth District	September 20
Sixth District	September 27
Seventh District	October 4
Eighth and Ninth Districts	October 11
Tenth District	October 18
Eleventh District	October 25
Twelfth District	November 1
Thirteenth District	November 8
Fourteenth District	November 15
Fifteenth and Sixteenth Districts	November 22
Seventeenth and Eighteenth Districts	November 29
Nineteenth District	December 6
Twentieth District	December 13

SUPERIOR COURTS, FALL TERM, 1921

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Fall Term, 1921—*Judge Horton*

Camden—Sept. 26.
Beaufort—July 25* (1); Oct. 3† (2); Nov. 21 (1); Dec. 19† (1).
Gates—Aug. 1 (1); Dec. 12 (1).
Tyrrell—Nov. 28 (1).
Currituck—Sept. 5 (1).
Chowan—Sept. 12 (1); Dec. 5 (1).
Pasquotank—Sept. 19 (1); Nov. 7 (1); Nov. 14† (1).
Hyde—Oct. 17 (1).
Dare—Oct. 24 (1).
Perquimans—Oct. 31 (1).

SECOND JUDICIAL DISTRICT

Fall Term, 1921—*Judge Allen.*

Washington—July 11 (1); Oct. 17 (1).
Nash—Aug. 29 (1); Oct. 10 (1); Nov. 28 (2).
Wilson—Sept. 5 (1); Oct. 3† (1); Oct. 31† (2); Dec. 19 (1).
Edgecombe—Sept. 12 (1); Nov. 14† (2).
Martin—Sept. 19 (2); Dec. 12 (1).

THIRD JUDICIAL DISTRICT

Fall Term, 1921—*Judge Calvert.*

Northampton—Aug. 1 (1); Oct. 31 (2).
Hertford—Aug. 8 (1); Oct. 17 (2).
Halifax—Aug. 15 (2); Nov. 28 (2).
Bertie—Aug. 29 (2); Nov. 14 (2).
Warren—Sept. 19 (2).
Vance—Oct. 3 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Cranmer.*

Lee—July 18 (2); Sept. 19† (1); Oct. 31‡ (2).
Chatham—Aug. 1‡ (2); Oct. 24 (1).
Johnston—Aug. 15* (1); Sept. 26† (2); Dec. 12 (2).
Wayne—Aug. 22 (2); Oct. 10† (2); Nov. 28 (2).
Harnett—Sept. 5‡ (2); Nov. 14† (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Lyon.*

Pitt—Aug. 22† (1); Aug. 29 (1); Sept. 12† (1); Sept. 26† (1); Oct. 24† (1); Oct. 31 (1).
Craven—Sept. 5* (1); Oct. 3* (2); Nov. 21† (2).
Carteret—Oct. 17 (1); Dec. 5† (1).
Pamlico—Nov. 7 (2).
Jones—Sept. 19 (1).
Greene—Dec. 12 (2).

SIXTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Devin.*

Onslow—July 18† (1); Oct. 10 (1); Dec. 5† (1).
Duplin—Aug. 29† (3); Nov. 21‡ (2).
Sampson—Aug. 8 (2); Sept. 19† (2); Oct. 24 (2).
Lenoir—Aug. 22* (1); Oct. 17 (1); Nov. 7† (2); Dec. 12* (1).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Bond.*

Wake—July 11* (1); Sept. 12* (1); Sept. 19† (2); Oct. 3† (1); Oct. 10* (1); Oct. 24† (2); Nov. 7* (1); Nov. 28† (2); Dec. 12* (1).
Franklin—Aug. 29† (2); Oct. 17* (1); Nov. 14† (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Connor.*

New Hanover—July 25* (1); Sept. 12* (1); Sept. 19† (1); Oct. 17† (2); Nov. 14* (1); Dec. 5† (2).
Pender—Sept. 26‡ (1); Oct. 31† (2).
Columbus—Aug. 22‡ (2); Nov. 21† (2); Dec. 19* (1).
Brunswick—Sept. 5† (1); Oct. 3‡ (1).

NINTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Kerr.*

Robeson—July 11* (1); Sept. 5† (2); Oct. 3† (2); Nov. 7* (1); Dec. 5† (2).
Bladen—Aug. 8* (1); Oct. 17† (1).
Hoke—Aug. 15 (2); Nov. 28 (1).
Cumberland—Aug. 29* (1); Sept. 19† (2); Oct. 24† (2); Nov. 21* (1).

TENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Daniels.*

Granville—July 25 (1); Nov. 14 (2).
Person—Aug. 15 (1); Oct. 17 (1).
Alamance—Aug. 22* (1); Sept. 12† (2); Nov. 28* (1).
Durham—Aug. 29* (1); Sept. 26† (2); Nov 7† (1); Dec. 12* (1).
Orange—Sept. 5 (1); Dec. 5 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Long.*

Ashe—July 11(2); Oct. 17 (1).

Forsyth—July 25* (2); Sept. 12† (2); Oct. 3 (2); Nov. 7† (2); Dec. 12* (1).

Rockingham—Aug. 8* (2); Nov. 21† (2).

Caswell—Aug. 22 (1); Dec. 5 (1).

Surry—Aug. 29 (2); Oct. 24 (2).

Alleghany—Sept. 26 (1).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Webb.*

Davidson—Aug. 1 (2); Nov. 21 (2).

Guilford—Aug. 15* (1); Aug. 22† (1); Sept. 5† (2); Sept. 19† (1); Oct. 3* (1); Oct. 10† (2); Nov. 7† (2); Dec. 5† (1); Dec. 12* (1); Dec. 19* (1).

Stokes—July 18† (1); Oct. 24* (1); Oct. 31† (1).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Finley.*

Stanly—July 11 (1); Oct. 10† (1); Nov. 21 (1).

Richmond—July 18† (1); July 25* (1); Sept. 5† (1); Sept. 26* (1); Nov. 7† (1); Dec. 5† (1).

Union—Aug. 1* (1); Aug. 22† (2); Oct. 17‡ (2).

Moore—Aug. 15* (1); Sept. 19† (1); Dec. 12† (1).

Anson—Sept. 12* (1); Oct. 3† (1); Nov. 14† (1).

Scotland—Oct. 31† (1); Nov. 28 (1).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Ray.*

Mecklenburg—July 11* (2); Aug. 29* (1); Sept. 5† (2); Oct. 3* (1); Oct. 10† (2); Oct. 31† (2); Nov. 14* (1); Nov. 21† (2).

Gaston—Aug. 15† (1); Aug. 22* (1); Sept. 19† (2); Oct. 24* (1); Dec. 5† (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge McElroy.*

Montgomery—July 11 (1); Sept. 26† (1); Oct. 3 (1).

Randolph—July 18† (2); Sept. 5* (1); Dec. 5 (2).

Iredell—Aug. 1‡ (2); Nov. 7‡ (2).

Cabarrus—Aug. 15‡ (3); Oct. 17‡ (2).

Rowan—Sept. 12 (2); Oct. 10† (1); Nov. 21 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Bryson.*

Lincoln—July 18 (1); Oct. 17‡ (2).

Cleveland—July 25 (2); Oct. 31 (2).

Burke—Aug. 8 (2); Oct. 3† (2); Dec. 5‡ (2).

Caldwell—Aug. 22 (2); Nov. 14 (3).

Polk—Sept. 19 (2).

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Lane.*

Catawba—July 4 (2); Oct. 31 (2).

Alexander—Sept. 19 (2).

Yadkin—Aug. 22 (1); Nov. 28† (1).

Wilkes—Aug. 8 (2); Oct. 3† (2).

Davie—Aug. 29 (1); Dec. 5† (1).

Watauga—Sept. 5 (2).

Mitchell—Aug. 1† (1); Nov. 14 (2).

Avery—July 18† (2); Oct. 17 (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Shaw.*

McDowell—July 11 (2); Sept. 19 (2).

Rutherford—Aug. 22 (2); Oct. 17 (2).

Henderson—Oct. 3 (2); Nov. 14† (2).

Yancey—Aug. 8† (1); Oct. 31 (2).

Transylvania—July 25 (2); Nov. 28 (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Adams.*

Buncombe—July 11 (3); Aug. 1† (3); Sept. 5 (3); Oct. 3† (3); Nov. 7 (3); Dec. 5† (3).

Madison—Aug. 22 (1); Sept. 26 (1); Oct. 24 (1); Nov. 21 (1).

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1921—*Judge Harding.*

Haywood—July 11 (2); Sept. 19 (2).

Cherokee—Aug. 8 (2); Nov. 7 (2).

Jackson—Oct. 10 (2).

Swain—July 25 (2); Oct. 24 (2).

Graham—Sept. 5 (2)

Clay—Oct. 3 (1).

Macon—Aug. 22 (2); Nov. 21 (2).

---

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—Henry G. Connor, *Judge*, Wilson.
Western District—James E. Boyd, *Judge*, Greensboro
Western District—Edwin Yates Webb, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. Ashe, Clerk.

Elizabeth City, second Monday in April and October. J. P. Thompson, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. Albert T. Willis, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. C. M. Symmes, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

E. F. Aydlett, United States District Attorney, Elizabeth City.

C. E. Thompson, Assistant United States District Attorney, Elizabeth City.

M. B. Simpson, Assistant United States District Attorney, Elizabeth City.

G. H. Bellamy, United States Marshal, Wilmington.

S. A. Ashe, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. Hyams, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

Stonewall J. Durham, United States District Attorney, Charlotte.

Clyde R. Hoey, Assistant United States District Attorney, Charlotte.

Charles A. Webb, United States Marshal, Asheville.

R. L. Blaylock, Clerk United States District Court.

CASES REPORTED

A

PAGE

Allen v. Cameron 120
Allen v. Lumber Co. 505
Allen v. Raleigh 453
Allen, Smith v. 56
Alston v. Williams 478
Aman, Hill v. 483
Armstrong v. Beaman 11
Auction Co., Paul v. 1
Autry, Herndon v. 271

B

Bank, Comrs. v. 347
Bank v. Crafton 404
Barden v. Express Co. 483
Barnes, Ellis v. 476
Barker v. Ins. Co. 267
Barker v. Ins. Co. 268
Barksdale, S. v. 621
Baugham v. Trust Co. 406
Beam, S. v. 597
Beaman, Armstrong v. 11
Becton v. Goodman 475
Bell, Butler v. 85
Blackwell v. Gastonia 378
Blank, Clark v. 110
Board of Education, Chandler v. 444
Bonner, Spruill v. 480
Boone v. Newsome 501
Boone v. Sykes 143
Brady v. Hughes 234
Brinson v. McCotter 482
Brown v. Owens 18
Brown v. Payne 381
Brunswick-Balke Co. v. Mecklenburg 386
Burch v. Bush 125
Burger, Sewing Machine Co. v. 241
Burris v. Litaker 376
Bush, Burch v. 125
Butler v. Bell 85

C

Caldwell, S. v. 519
Cameron, Allen v. 120
Campbell v. Pearce 494
Carraway, S. v. 561
Cedar Works v. Shepard 13
Chandler v. Board of Education 444
Charlotte, Mack v. 383

PAGE

Churchwell v. Trust Co. 21
Clark v. Bland 110
Clendenin v. Clendenin 465
Coble v. Legg 499
Coble, S. v. 554
Cole, Dalrymple v. 285
Combs v. Ins. Co. 218
Comrs. v. Bank 347
Comrs., Emery v. 420
Comrs. v. Jennings 393
Comrs., Long v. 146
Comrs., Sechrist v. 511
Comrs., Thompson v. 265
Constr. Co., Stephens Co. v. 504
Costin v. Power Co. 196
Cotton v. Fisheries Co. 151
Cotton Mills v. Cotton Mills 73
Cotton Mills v. Hosiery Mills 33
Craft v. Lumber Co. 29
Crafton, Bank v. 404
Cromer, Long v. 354
Crowell v. Crowell 66

D

Dalrymple v. Cole 285
Dicks v. Young 448
Diggs, S. v. 550
Durham v. Hamilton 232
Durham, Munick v. 188
Dye v. Morrison 309

E

Early, Grocery Co. v. 459
Elizabeth City, Lumber Co. v. 442
Ellis v. Barnes 476
Emery v. Comrs. 420
Express Co., Barden v. 483
Express Co., Moore v. 300

F

Fertilizing Co. v. Thomas 274
Fisheries Co., Cotton v. 151
Forbes v. Harrison 461
Fountain v. Jones 27

G

Gastonia, Blackwell v. 378
Gettys, S. v. 580
Goodman, Becton v. 475

PAGE
Gray v. Warehouse Co. 166
Green v. Vonde Co. 317
Grocery Co. v. Early 459
Guano Co. v. Supply Co. 210
Guilford Co. v. Ins. Co. 288

H

Hagood v. Holland 64
Hall, S. v. 527
Hamilton, Durham v. 232
Harriett v. Harriett 75
Harrill v. R. R. 315
Harris, S. v. 600
Harrison, Forbes v. 461
Hart v. Woodmen 488
Helms, S. v. 566
Herndon v. Autry 271
Highway Commission v. Varner 42
Hill v. Aman 483
Hill, S. v. 558
Hines v. Reynolds 343
Holland, Hagood v. 64
Holmes, Little v. 413
Holmes v. R. R. 497
Homes Co., Stephens Co. v. 335
Horton, Hutton v. 647
Hosiery Mills, Cotton Mills v. 33
House v. Parker 40
Houston, Thomas v. 91
Howell, Lantz v. 401
Howell v. Pate 117
Huffman v. Ingold 426
Hughes, Brady v. 234
Hutchinson v. Lucas 53
Hutton v. Horton 647

I

Ingold, Huffman v. 426
Ingram v. Power Co. 359
Ingram v. Power Co. 411
Ingram v. R. R. 491
In re Johnson 303
Ins. Co., Barker v. 267
Ins. Co., Barker v. 268
Ins. Co., Combs v. 218
Ins. Co., Guilford Co. v. 288
Ins. Co., Kinsey v. 478
Ins. Co., Newman v. 485
Ins. Co., Tatham v. 434

J

Jackson v. R. R. 153
Jennings, Comrs. v. 393
Jessup, S. v. 548

PAGE
Johnson, *In re* 303
Johnson, S. v. 638
Jones, Fountain v. 27
Jones, S. v. 543
Jones, S. v. 546
Jordan v. Power Co. 647
Journigan, Roe v. 180
Justice v. Lumber Co. 390

K

Kerner, S. v. 574
Kinsey v. Ins. Co. 478
Klaff, Samet v. 502

L

Lamb v. R. R. 647
Land Co. v. Yarborough 480
Lantz v. Howell 401
Legg, Coble v. 499
Lemmons v. Sigman 238
Litaker, Burris v. 376
Little v. Holmes 413
Loggins v. Utilities Co. 221
Long v. Comrs. 146
Long v. Cromer 354
Lucas, Hutchinson v. 53
Lumber Co., Allen v. 505
Lumber Co., Craft v. 29
Lumber Co. v. Elizabeth City 442
Lumber Co., Justice v. 390
Lumber Co., Sluder v. 69
Lumber Co., Steed v. 508

M

Mack v. Charlotte 383
McCollum, S. v. 584
McCormick, Patterson v. 311
McCotter, Brinson v. 482
McPhail, Mfg. Co. v. 205
Mfg Co. v. McPhail 205
Mfg. Co., Roberts v. 204
Marshall v. Tel. Co. 292
Marshall v. Tel. Co. 410
Mecklenburg, Brunswick-Balke Co. v. 386
Meekins, Swift & Co. v. 647
Millner, Morganton v. 364
Mills Co., Mining Co. v. 361
Mills, Morrow v. 423
Mills, S. v. 530
Mining Co. v. Mills Co. 361
Mizell v. R. R. 36
Moody v. Wike 509
Moore v. Express Co. 300

PAGE
Morganton v. Millner 364
Morris, Rubber Co. v. 184
Morrow v. Mills 423
Morrison, Dye v. 309
Motor Co., Tire Co. v. 230
Mott, Parker v. 435
Munick v. Durham 188
Munter, Rhyne v. 504
Muse, S. v. 506

N

Newman v. Ins. Co. 485
Newsome, Boone v. 501

O

Ogburn, Trust Co. v. 324
Owens, Brown v. 18

P

Parker, House v. 40
Parker v. Mott 435
Parker v. R. R. 95
Parris, S. v. 585
Pate, Howell v. 117
Patterson v. McCormick 311
Paul v. Auction Co. 1
Payne, Brown v. 381
Pearce, Campbell v. 494
Pearson, S. v. 588
Penniman, Winder v. 7
Powell, S. v. 515
Power Co., Costin v. 196
Power Co., Ingram v. 359
Power Co., Ingram v. 411
Power Co., Jordan v. 647
Power Co., Public Service Co. v. 356
Power Co., Spears v. 447
Power Co., Ware v. 500
Pritchard v. Williams 46
Public Service Co. v. Power Co. 356
Pusey v. R. R. 137

R

R. R., Harrill v. 315
R. R., Holmes v. 497
R. R., Ingram v. 491
R. R., Jackson v. 153
R. R., Lamb v. 647
R. R., Mizell v. 36
R. R., Parker v. 95
R. R., Pusey v. 137
R. R., Wynns v. 477
Raleigh, Allen v. 453
Reed, S. v. 507

PAGE
Reynolds, Hines v. 343
Rhodes, S. v. 481
Rhyne v. Munter 504
Roberson v. Stokes 59
Roberts v. Mfg. Co. 204
Robinson, S. v. 516
Robinson, S. v. 552
Roe v. Journigan 180
Rountree, S. v. 535
Rubber Co. v. Morris 184

S

Samet v. Klaff 502
Sechrist v. Comrs. 511
Sewing Machine Co. v. Burger 241
Shepard, Cedar Works v. 13
Short, Wise v. 320
Sigman, Lemmons v. 238
Sluder v. Lumber Co. 69
Smith v. Allen 56
Spears v. Power Co. 447
Sprout v. Ward 372
Spruill v. Bonner 480
S. v. Barksdale 621
S. v. Beam 597
S. v. Caldwell 519
S. v. Carraway 561
S. v. Coble 554
S. v. Diggs 550
S. v. Gettys 580
S. v. Hall 527
S. v. Harris 600
S. v. Helms 566
S. v. Hill 558
S. v. Jessup 548
S. v. Johnson 638
S. v. Jones 543
S. v. Jones 546
S. v. Kerner 574
S. v. McCollum 584
S. v. Mills 530
S. v. Muse 506
S. v. Parris 585
S. v. Pearson 588
S. v. Powell 515
S. v. Reed 507
S. v. Rhodes 481
S. v. Robinson 516
S. v. Robinson 552
S. v. Rountree 535
S. v. Stokes 539
S. v. Westmoreland 590
Steed v. Lumber Co. 508
Stephens Co. v. Constr. Co. 504

PAGE
Stephens Co. v. Homes Co. 335
Stokes, Roberson v. 59
Stokes, S. v. 539
Supply Co., Guano Co. v. 210
Supply Co. v. Watt 432
Swift & Co. v. Meekins 647
Sykes, Boone v. 143

T

Tatham v. Ins. Co. 434
Tel. Co., Marshall v. 292
Tel. Co., Marshall v. 410
Thomas, Fertilizing Co. v. 274
Thomas v. Houston 91
Thompson v. Comrs. 265
Tire Co. v. Motor Co. 230
Trust Co., Baugham v. 406
Trust Co., Churchwell v. 21
Trust Co. v. Ogburn 324
Trust Co., Trustees v. 306
Trustees v. Trust Co. 306
Tudor, Tyree v. 214
Turnpike Co., Watts v. 129
Tyree v. Tudor 214

U

Utilities Co., Loggins v. 221

V

PAGE
Varner, Highway Commission v. 42
Vonde Co., Green v. 317

W

Wallace v. Wallace 158
Ward, Sprout v. 372
Ware v. Power Co. 500
Warehouse Co., Gray v. 166
Watt, Supply Co. v. 432
Watts v. Turnpike Co. 129
Westmoreland, S. v. 590
Whichard v. Whitehurst 79
Whitehurst, Whichard v. 79
Wike, Moody v. 509
Williams, Alston v. 478
Williams, Pritchard v. 46
Winder v. Penniman 7
Wise v. Short 320
Wood v. Wood 227
Woodmen, Hart v. 488
Wynns v. R. R. 477

Y

Yarborough, Land Co. v. 480
Young, Dicks v. 448

CASES CITED

A

Abbott v. Hancock	123 N. C.,	99	415
Abbott v. Hunt	129 N. C.,	403	66
Abernethy v. Comrs.	169 N. C.,	631	266, 625
Acheson, Malloy v.	179 N. C.,	95	55
Accident Co., Lowe v.	115 N. C.,	18	434
Adams v. Beasley	174 N. C.,	118	253
Adams, Combes v.	150 N. C.,	64	311
Adams v. Hayes	24 N. C.,	361	94, 439
Adams v. R. R.	110 N. C.,	325	425
Adams, S. v.	133 N. C.,	671	560
Adams v. Turrentine	30 N. C.,	149	149
Aiken, Fertilizer Works v.	175 N. C.,	398	281
Aiken, Shell v.	155 N. C.,	212	251, 265
Albemarle, Asbury v.	162 N. C.,	247	149
Alexander, Williams v.	74 N. C.,	1	233
Allen, Gilreath v.	32 N. C.,	67	153
Allen v. McLendon	113 N. C.,	319	608
Allen, Powell v.	103 N. C.,	49	261
Allen, Pugh v.	179 N. C.,	309	346
Allen v. R. R.	149 N. C.,	260	102
Allen v. R. R.	171 N. C.,	339	311
Allen v. Reidsville	178 N. C.,	513	448
Allen, Smith v.	112 N. C.,	226	471
Allen v. Strickland	100 N. C.,	225	273
Alley v. Pipe Co.	159 N. C.,	328	294
Alley, S. v.	180 N. C.,	663	569
Alligood, Keys v.	178 N. C.,	16	179
Alphin, S. v.	81 N. C.,	566	528
Alston v. Hill	165 N. C.,	258	25
Ames, Beacom v.	161 N. C.,	357	66, 80, 82, 408
Ammons v. R. R.	138 N. C.,	559	499
Ammons v. R. R.	140 N. C.,	198	499
Anderson v. Logan	105 N. C.,	266	84
Anderson, S. v.	80 N. C.,	429	243
Anderson v. Wilkins	142 N. C.,	153	514
Ange v. Woodmen	173 N. C.,	33	193
Angel, McKee v.	90 N. C.,	60	273
Armfield Co. v. Saleeby	178 N. C.,	298	186
Armfield v. Walker	27 N. C.,	583	81, 84
Armstrong v. Lonon	149 N. C.,	435	433
Asbury v. Albemarle	162 N. C.,	247	149
Ashe v. DeRosset	50 N. C.,	299	375
Asheville, Cressler v.	138 N. C.,	485	613
Asheville, Howland v.	174 N. C.,	749	385
Asheville, Moffitt v.	103 N. C.,	237	385
Asheville, Sondley v.	112 N. C.,	694	391
Askew v. Koonce	118 N. C.,	532	262
Askew v. Matthews	175 N. C.,	187	93, 439

Assur. Co., Holly v....170 N. C., 4....434
Assur. Co., Muse v....108 N. C., 240....434
Assur. Soc., Schas v....170 N. C., 420....35
Austin v. Austin....160 N. C., 367....122
Austin, Helms v....116 N. C., 753....81
Austin, S. v....79 N. C., 626....62
Austin v. Staton....126 N. C., 783....470, 471
Aydlett v. Brown....153 N. C., 334....433

B

Badger v. Daniel....77 N. C., 253....287
Bagwell v. R. R....167 N. C., 611, 615, 616....103, 105, 108, 142, 143, 202
Bailes, Bowden v....101 N. C., 612....152
Bailey, Willeford v....132 N. C., 402....417
Bain, Comrs. v....173 N. C., 377....267
Baird v. Baird....62 N. C., 317....287
Baird, Buffkin v....73 N. C., 283....128
Baird, Lee v....146 N. C., 361....613
Baker v. R. R....144 N. C., 37, 44....103, 105, 142
Baker, Gay v....58 N. C., 344....84
Baker, Sain v....128 N. C., 256....346
Baker, S. v....106 N. C., 758....533
Baldwin, S. v....178 N. C., 687, 693....519, 604
Ballard, Lowman v....168 N. C., 16....273
Bank v. Comrs....119 N. C., 214....455
Bank, Comrs. v....152 N. C., 387, 390....455
Bank, Glenn v....70 N. C., 191....405
Bank v. Justice....157 N. C., 273, 275....221
Bank, Moore v....173 N. C., 183....253
Bank v. Wilson....124 N. C., 569....251
Bank v. Wilson....168 N. C., 557....119
Barco, S. v....150 N. C., 792....44
Barham, Stell v....87 N. C., 62....84
Barrett v. Brewer....143 N. C., 88....473, 475
Barrett, S. v....138 N. C., 630....569
Barringer, Coble v....171 N. C., 445....361
Barrow, Moore v....24 N. C., 437....346
Baskerville, S. v....141 N. C., 811....244
Basnight v. Jobbing Co....148 N. C., 350....208
Basnight v. R. R....111 N. C., 592....382
Batchelor v. Whitaker....88 N. C., 350....84
Batts, Thompson v....168 N. C., 335....409
Baxter, Costin v....41 N. C., 197....363
Beacom v. Amos....161 N. C., 357....80, 82, 408
Bean, S. v....175 N. C., 749....569
Beasley, Adams v....174 N. C., 118....253
Beasley, Bland v....145 N. C., 169....467
Beaver v. Fetter....176 N. C., 335....411
Beck, Bilyeu v....178 N. C., 481....216
Behrman, S. v....114 N. C., 804....617
Bell v. Harrison....179 N. C., 190....464
Bell, Johnson v....74 N. C., 355....64
Bell v. R. R....163 N. C., 180....383

Benbow, Stern v. ....151 N. C., 462 402
Bennett, *In re* ....180 N. C., 5 .... 305, 321
Bennett, S. v. .... 93 N. C., 503 528
Benson v. Benson ....180 N. C., 106 54
Benton v. Collins ....118 N. C., 196 257
Benton, S. v. .... 19 N. C., 196 64
Bergeron v. Ins. Co. ....111 N. C., 45 490
Bernhardt v. Dutton ....146 N. C., 208 252
Berry v. Haines .... 4 N. C., 311 388
Best, S. v. ....111 N. C., 638 529
Bickett v. Tax Commission ....177 N. C., 433 178
Biggs, Crisp v. ....176 N. C., 1 161
Biggs, Williams v. ....176 N. C., 50 56
Bilyeu v. Beck ....178 N. C., 481 216
Bitting v. Thaxton .... 72 N. C., 541 254
Black, *In re* ....162 N. C., 458 534
Blackledge v. Simmons ....180 N. C., 535 162
Blackley, S. v. ....138 N. C., 622 573
Bland v. Beasley ....145 N. C., 169 467
Bland, Real Estate Co. v. ....152 N. C., 225 84
Blue v. Ritter ....118 N. C., 580 124
Board of Education v. Comrs. ....174 N. C., 47 135
Bogert v. Mfg. Co. ....172 N. C., 248 433
Boggan v. Somers ....152 N. C., 390 84
Boney v. R. R. ....145 N. C., 248 101
Bonsal, Houser v. ....149 N. C., 51 243
Boone, S. v. ....132 N. C., 1108 576
Borden v. Power Co. ....174 N. C., 73 613
Boring, Comrs. v. ....175 N. C., 105 388
Bost, Newman v. ....122 N. C., 524 .... 93, 94, 439
Bourne v. Farrar ....180 N. C., 135 55
Bowden v. Bailes ....101 N. C., 612 152
Bowser v. Tarry ....156 N. C., 38 209
Boyd, Cole v. ....175 N. C., 558 464
Boyd, Whitfield v. ....158 N. C., 453 78
Bradshaw v. High Point ....151 N. C., 517 352
Brady, S. v. ....177 N. C., 587 516
Branch, Lumber Co. v. ....158 N. C., 251 430
Branch, Willis v. .... 94 N. C., 149 374
Brewer, Barrett v. ....143 N. C., 88 .... 473, 475
Brewer, Dickson v. ....180 N. C., 403 308
Brewer v. Ring ....177 N. C., 476, 484 .... 35, 297
Bridge Co., Knight v. ....172 N. C., 393 464
Bridges v. Pleasants .... 39 N. C., 26 332
Briggs, *In re* ....135 N. C., 120 575
Brinkley, Jones v. ....174 N. C., 23 5
Briscoe v. Parker ....145 N. C., 14 32
Britt v. R. R. ....148 N. C., 37, 41 .... 104, 294, 298, 299
Brittain v. Mull .... 91 N. C., 498 371
Brittingham v. Stadiem ....151 N. C., 300 217
Britton v. R. R. .... 88 N. C., 536, 544 .... 115, 194
Brotherhood, Robinson v. ....170 N. C., 545 490
Brown, Aydlett v. ....153 N. C., 334 433
Brown v. Chemical Co. ....165 N. C., 421 .... 413, 425

Brown, Collingwood v.	106 N. C., 367	288
Brown v. Comrs.	173 N. C., 598	308, 350
Brown, Duke v.	96 N. C., 127	149
Brown v. Jackson	179 N. C., 365, 375	38
Brown v. Taylor	173 N. C., 700	391
Brown v. Taylor	174 N. C., 423	8
Bruden, Malloy v.	86 N. C., 251	473
Bucken v. R. R.	157 N. C., 443	193
Buffkin v. Baird	73 N. C., 283	128
Buggy Co., Hardware Co. v.	167 N. C., 423	373
Buhmann, Lumber Co. v.	160 N. C., 385	273
Bullard, McLeod v.	84 N. C., 516	464
Bullock, Hicks v.	96 N. C., 164	81
Bullock, Holmes v.	178 N. C., 379, 380	249, 370
Bumgardner v. R. R.	132 N. C., 440	565
Bunch, Seawell v.	51 N. C., 195	471
Bunn v. Wells	94 N. C., 67	81
Burbank v. Comrs.	92 N. C., 260	258, 261
Burden v. Lipsitz	166 N. C., 523	54, 55, 408
Burnett, S. v.	142 N. C., 581	418
Burnett, S. v.	179 N. C., 735	389, 541, 555
Burnham, Canal Co. v.	147 N. C., 41	31
Burns v. Stewart	162 N. C., 360	89
Burroughs, Redmond v.	63 N. C., 242	163
Burton v. R. R.	84 N. C., 197	62
Burton, S. v.	138 N. C., 578	572, 573
Burwell v. Chapman	159 N. C., 211	471
Bynum v. Bynum	33 N. C., 636	62
Bynum, Fields v.	156 N. C., 413	153
Bynum, Rosser v.	168 N. C., 340	433

C

Caldwell v. Robinson	179 N. C., 518	509
Caldwell, S. v.	112 N. C., 854	585
Call, Jones v.	96 N. C., 344, 345	374
Callum, McAdoo v.	86 N. C., 419	247
Calvert v. Williams	64 N. C., 168	405
Cameron v. Power Co.	137 N. C., 101	608
Campbell v. Campbell	179 N. C., 416	213
Campbell v. Everhart	139 N. C., 511	84
Campbell v. Power Co.	166 N. C., 488	205
Canal Co. v. Burnham	147 N. C., 41	31
Canal Co., Cherry v.	140 N. C., 422, 426	377
Canton, Felmet v.	177 N. C., 52	385
Carden v. S. & D. of Liberty	179 N. C., 399	490
Carlson, S. v.	171 N. C., 818	538
Carman v. Page	59 N. C., 37	464
Carmichael v. Tel. Co.	157 N. C., 21	104
Carpenter, Gaither v.	143 N. C., 241	360
Carpenter v. Wall	20 N. C., 279	460
Carr, Holmes v.	172 N. C., 215	471
Carter v. King	174 N. C., 549	5
Carter v. McGill	168 N. C., 507	280, 281, 282
Carter v. McGill	171 N. C., 775	280, 281

Carter v. Reaves.....167 N. C., 131..... 91
Carter v. Rountree.....109 N. C., 29..... 273
Castlebury, Hall v.....101 N. C., 153..... 465
Cathey, S. v.....170 N. C., 794..... 534
Caton v. Toler.....160 N. C., 104..... 298
Cauble, S. v..... 70 N. C., 62..... 533
Cedar Works, Hawkins v.....122 N. C., 87..... 471
Chaffin, Pratt v.....136 N. C., 350..... 209
Chancey v. Powell.....103 N. C., 159..... 471
Chapman, Burwell v.....159 N. C., 211..... 471
Charlotte, Norment v..... 85 N. C., 387..... 149
Cheese Co. v. Pipkin.....155 N. C., 394, 396.....245, 246, 247, 263, 367
Chemical Co., Brown v.....165 N. C., 421.....413, 425
Chemical Co., Webb v.....170 N. C., 662..... 425
Cherokee Co. v. Meroney.....173 N. C., 655..... 208
Cherry v. Canal Co.....140 N. C., 422, 426..... 377
Cherry v. Cherry.....179 N. C., 4.....54, 55
Chestnutt, Rackley v.....110 N. C., 262.....81, 84
Chisenhall, S. v.....106 N. C., 676..... 418
Christianbury, S. v..... 44 N. C., 46..... 551
Chronicle, Paper Co. v.....115 N. C., 147..... 608
Clancy v. Overman..... 18 N. C., 402..... 128
Clark, Hughes v.....134 N. C., 457..... 340
Clark v. Statesville.....139 N. C., 490..... 149
Clark v. Sweaney.....175 N. C., 280..... 216
Clark v. Sweaney.....176 N. C., 529..... 216
Clark v. Traction Co.....138 N. C., 77.....224, 225
Claus v. Lee.....140 N. C., 554..... 302
Claywell v. Comrs.....173 N. C., 657..... 455
Clegg, Cobb v.....137 N. C., 153..... 179
Clements v. R. R.....179 N. C., 225..... 101
Clothing Co. v. Hay.....163 N. C., 495..... 270
Cloud v. Wilson..... 72 N. C., 155..... 149
Cobb v. Clegg.....137 N. C., 153..... 179
Cobb v. Morgan..... 83 N. C., 211..... 252
Cobb v. R. R.....175 N. C., 132..... 153
Coble v. Barringer.....171 N. C., 445..... 361
Coble v. Shoffner..... 75 N. C., 43..... 641
Cahoon v. Upton.....174 N. C., 88..... 161
Cole v. Boyd.....175 N. C., 558..... 464
Cole, Dalrymple v.....170 N. C., 102.....286, 287
Coleman v. Fuller.....105 N. C., 328..... 460
Coles v. Lumber Co.....150 N. C., 183..... 374
Collingwood v. Brown.....106 N. C., 367..... 288
Collins, Benton v.....118 N. C., 196..... 257
Collins v. Davis.....132 N. C., 106..... 470
Collins v. Land Co.....128 N. C., 563.....340, 341, 343, 403
Collins, S. v..... 30 N. C., 407..... 64
Coltrane v. Laughlin.....157 N. C., 282..... 270
Combes v. Adams.....150 N. C., 64..... 311
Commander, Elizabeth City v.....176 N. C., 26..... 339
Comrs., Abernethy v.....169 N. C., 631.....266, 625
Comrs. v. Bain.....173 N. C., 377..... 267
Comrs., Bank v.....119 N. C., 214..... 455

Comrs. v. Bank 152 N. C., 387, 390 455
Comrs., Board of Education v. 174 N. C., 47 135
Comrs. v. Boring 175 N. C., 105 388
Comrs., Brown v. 173 N. C., 598 308, 350
Comrs., Burbank v. 92 N. C., 260 258, 261
Comrs., Claywell v. 173 N. C., 657 455
Comrs. v. Comrs. 165 N. C., 632 351
Comrs. v. DeRosset 129 N. C., 275 455
Comrs., Fortune v. 140 N. C., 322 625
Comrs., Guire v. 177 N. C., 516 455
Comrs., Hargrave v. 168 N. C., 626 351
Comrs., Mills v. 175 N. C., 215 134, 135, 308, 350
Comrs., Mott v. 126 N. C., 866, 871 244, 247, 248
Comrs., Phifer v. 157 N. C., 150 508
Comrs. v. Pruden 178 N. C., 394 350
Comrs., R. R. v. 72 N. C., 486 148
Comrs., R. R. v. 108 N. C., 56 136
Comrs., Smathers v. 125 N. C., 480 352
Comrs. v. Sparks 179 N. C., 581 248
Comrs. v. Snuggs 121 N. C., 394 455
Comrs., Tate v. 122 N. C., 661 248
Comrs. v. Trust Co. 164 N. C., 301 353
Comrs. v. Webb 160 N. C., 594 135
Comrs., Woodall v. 176 N. C., 377 455
Cone, Reich v. 180 N. C., 267 218
Connor, S. v. 142 N. C., 700, 701 573, 626
Conrad v. Land Co. 126 N. C., 776 340
Construction Co., McDowell v. 96 N. C., 514 149
Construction Co., Wheeler v. 170 N. C., 427 339
Cook v. Cook 159 N. C., 47 229
Cook v. R. R. 128 N. C., 336 193
Cook, S. v. 162 N. C., 586 547
Cooke v. Hospital 168 N. C., 256 101
Cooper v. Evans 174 N. C., 412 251, 259, 265
Cooper, King v. 128 N. C., 347 16, 17
Cooper v. R. R. 170 N. C., 490 112
Cooper, Whitesides v. 115 N. C., 570 55, 56, 162
Cooper v. Wyman 122 N. C., 784 8
Cooperage Co., Winborne v. 178 N. C., 88 506
Costin v. Baxter 41 N. C., 197 366
Cotten, McClenahan v. 83 N. C., 332 245, 259, 264
Cotton v. Fisheries Product Co. 177 N. C., 56, 59 112, 151
Cotton, Mayho v. 69 N. C., 289 288
Cotton Mills, Heath v. 115 N. C., 208 70
Cotton Mills, Hosiery Co. v. 140 N. C., 454 75
Cotton Mills, Lynn v. 130 N. C., 621 250, 253, 257
Cotton Mills, Marks v. 135 N. C., 289 295
Cotton Mills, Mining Co. v. 143 N. C., 307 363
Cotton Mills, Thigpen v. 151 N. C., 97 205
Cotton Mills, Tompkins v. 130 N. C., 350 374
Cotton Mills v. Waxhaw 130 N. C., 293 388
Council v. Pridgen 153 N. C., 444 467, 473
Cox v. R. R. 166 N. C., 652 38
Cox, S. v. 150 N. C., 846 619, 620

Craft, Whichard v.	175 N. C., 128	55
Crampton v. Ivie	126 N. C., 894	105, 108, 142
Cressler v. Asheville	138 N. C., 485	613
Crews, S. v.	128 N. C., 581	515
Crisp v. Biggs	176 N. C., 1	161
Cromartie v. Parker	121 N. C., 198	205
Crook, S. v.	91 N. C., 536, 540	533, 546
Culbreth v. R. R.	169 N. C., 725	301
Cullens v. Cullens	161 N. C., 344	80, 84
Currie, S. v.	161 N. C., 276	533
Currie v. Worthy	47 N. C., 104	236

D

Dail, Powell v.	172 N. C., 261	288
Dalrymple v. Cole	170 N. C., 102	286, 287
Daniel, Badger v.	77 N. C., 253	287
Daniel v. Hodges	87 N. C., 100	287
Daniel v. R. R.	117 N. C., 592	115, 116, 194
Daniel, S. v.	87 N. C., 507	589
Daniels v. Homer	139 N. C., 219	641, 645
Daniels, Julian v.	175 N. C., 549	240
Darden v. Steamboat Co.	107 N. C., 437	70
Davenport v. Hassel	45 N. C., 29	163
Davidson v. Gifford	100 N. C., 18	231
Davis, Collins v.	132 N. C., 106	470
Davis, Hancock v.	179 N. C., 283	468
Davis v. Martin	146 N. C., 281	119
Davis v. Morris	132 N. C., 435	340
Davis, S. v.	79 N. C., 603	598
Davis, Watson v.	52 N. C., 178, 181	527
Davis, Wilmington v.	63 N. C., 582	244
Deans v. R. R.	107 N. C., 686	204
Deaton, Mills v.	170 N. C., 386	266
DeBerry, S. v.	123 N. C., 703	560
Debnam, S. v.	98 N. C., 712	608
Dellinger, Wilkinson v.	126 N. C., 462	415, 419
DeRosset, Ashe v.	50 N. C., 299	375
DeRosset, Comrs. v.	129 N. C., 275	455
Devereux, Hyman v.	65 N. C., 589	183
Devereux, Mordecai v.	74 N. C., 673	183
Dew, Noville v.	94 N. C., 44	243
Dick, S. v.	60 N. C., 440	547
Dickson v. Brewer	180 N. C., 403	308
Dixon, Hall v.	174 N. C., 319	287
Dobbin v. Dobbin	141 N. C., 219	471
Dobbins, Shermer v.	176 N. C., 549	467
Doggett, Suttle v.	87 N. C., 203	366
Donlan v. Trust Co.	139 N. C., 212	183
Dorsey v. Mining Co.	177 N. C., 60	509
Doster, S. v.	157 N. C., 634	244
Doub, Helsabeck v.	167 N. C., 206	58
Dougherty v. Sprinkle	88 N. C., 300	367
Dowling, Wittson v.	179 N. C., 542	339
Downey, Smith, Admr., v.	38 N. C., 268	441

Downing, Hair v.	96 N. C., 172	31
Downing, Winborne v.	105 N. C., 20	81
Drug Co., Wooten v.	169 N. C., 64	244
Duckworth v. Orr	126 N. C., 674	439
Duke v. Brown	96 N. C., 127	149
Dunn, Monds v.	163 N. C., 110	294
Dunn v. R. R.	174 N. C., 258	102
Dupree v. Dupree	45 N. C., 164	84
Durfey, Norris v.	168 N. C., 325	122
Durham, Holloway v.	176 N. C., 550	233
Durham, Osborne v.	157 N. C., 263	221
Durham, Reade v.	173 N. C., 668	134
Dutton, Bernhardt v.	146 N. C., 208	252
Duval v. R. R.	134 N. C., 331, 333	103, 105, 142
Duvall, Johnson v.	135 N. C., 642	70

E

Earnhardt, S. v.	170 N. C., 725, 727	625
Edenton v. Wool	65 N. C., 379	244
Edwards, Francis v.	77 N. C., 276	259
Edwards v. Phifer	120 N. C., 405	101
Edwards, Price v.	178 N. C., 503	448
Edwards v. R. R.	132 N. C., 99	109
Edwards v. Sorrell	150 N. C., 715	260
Edwards, S. v.	86 N. C., 666	170
Efland v. R. R.	146 N. C., 135	389, 541
Electric Co. v. Williams	123 N. C., 51, 54, 55	246, 258, 259, 261, 262
Elizabeth City v. Commander	176 N. C., 26	339
Elizabeth City, Sexton v.	169 N. C., 385	311, 339
Ellen, Trust Co. v.	163 N. C., 47	101
Ellington v. Ellington	103 N. C., 58	89
Emerson, Ledford v.	143 N. C., 527	6
Erwin, Phifer v.	100 N. C., 65	550
Evans, Cooper v.	174 N. C., 412	251, 259, 265
Everett, Hurst v.	91 N. C., 399, 405	247, 259
Everhart, Campbell v.	139 N. C., 511	84
Express Co., Pendergraph v.	178 N. C., 344	316
Express Co., Reynolds v.	172 N. C., 487	119
Express Co., Thompson v.	180 N. C., 42	316
Exum, Park v.	156 N. C., 228	547
Exum, S. v.	138 N. C., 599, 602	519

F

Falkner v. Pilcher	137 N. C., 449	231
Falls, Rudasill v.	92 N. C., 222	221
Farrar, Bourne v.	180 N. C., 135	55
Faulk v. Mystic Circle	171 N. C., 302	434
Featherstone, Wilson v.	122 N. C., 747, 750	93, 439
Felmet v. Canton	177 N. C., 52	385
Fenwick, Parker v.	138 N. C., 209	375
Fertilizer Co. v. Lane	173 N. C., 184	311
Fertilizer Works v. Aiken	175 N. C., 398	281
Fertilizer Works v. McLawhorn	158 N. C., 274	280, 283

Fetter, Beaver v. 176 N. C., 335 411
Fields v. Bynum 156 N. C., 413 153
Fidelity Co., Fishblate v. 140 N. C., 589 490
Finger, S. v. 131 N. C., 781 526
Fink, S. v. 179 N. C., 712 379
Finley, Proctor v. 119 N. C., 541 411
Fishblate v. Fidelity Co. 140 N. C., 589 490
Fisher, S. v. 117 N. C., 733 340
Fisher v. Trust Co. 138 N. C., 224 257
Fisheries Product Co., Cotton v. 177 N. C., 56, 59 112, 151
Fleer, Trollinger v. 157 N. C., 81, 87 221
Fleetwood, Wool v. 136 N. C., 460, 470, 471 162, 409
Foard v. R. R. 53 N. C., 235 374
Foil v. Newsome 138 N. C., 115 122
Ford v. McBrayer 171 N. C., 421 161
Fore, S. v. 180 N. C., 744 506, 627
Forney, Paine v. 128 N. C., 237 327, 328
Fortescue v. Satterthwaite 23 N. C., 566 347
Fortune v. Comrs. 140 N. C., 322 625
Foster, S. v. 130 N. C., 666, 675 589, 595
Foust, Page v. 89 N. C., 447 122
Fox v. Texas Co. 180 N. C., 543 399
Francis v. Edwards 77 N. C., 276 259
Francks v. Whitaker 116 N. C., 518 346
Frederick v. Williams 103 N. C., 189 471
Freeman, Nichols v. 33 N. C., 99 119
Freeman, S. v. 146 N. C., 615 518
French, Smith v. 141 N. C., 2, 6 246, 254, 258, 264
Frizzle, Rives v. 43 N. C., 237 409
Fry, Matthews v. 141 N. C., 582 16
Fulbright v. Yoder 113 N. C., 456 81, 84
Fuller, Coleman v. 105 N. C., 328 460
Fuller, S. v. 114 N. C., 885 530
Furr v. Johnson 140 N. C., 157 240

G

Gaither v. Carpenter 143 N. C., 241 360
Galloway v. Goolsby 176 N. C., 638 402
Gallup v. Rozier 172 N. C., 283 186, 188
Garrett v. Love 89 N. C., 205, 207 246, 262, 264
Garris, Whitfield v. 134 N. C., 24 54
Garrison v. Machine Co. 159 N. C., 285 209
Gash, S. v. 177 N. C., 595 538
Gates v. Hill 158 N. C., 584 269
Gatling, University v. 81 N. C., 509 328
Gay v. Baker 58 N. C., 344 84
Gay, S. v. 94 N. C., 821 608
George, S. v. 93 N. C., 567 418
Georgia Co., Guilford v. 112 N. C., 34 388
Gerard, S. v. 37 N. C., 210 331
Gerringer v. Ins. Co. 133 N. C., 414 434
Giessell, Hall v. 179 N. C., 657 448, 593
Gifford, Davidson v. 100 N. C., 18 231
Gill, Williams v. 122 N. C., 967 115, 116

Gilliam v. R. R.	179 N. C., 508	101
Gillikin, S. v.	114 N. C., 832	534
Gilmer, Smathers v.	126 N. C., 757	402
Gilreath v. Allen	32 N. C., 67	153
Gladden, Nichols v.	117 N. C., 497	161
Gladstein, Levin v.	142 N. C., 495	252, 370
Glenn v. Bank	70 N. C., 191	405
Godwin v. Tel. Co.	136 N. C., 258	177
Goff v. R. R.	179 N. C., 219, 220	202, 203
Goings, S. v.	98 N. C., 766	585
Goldsboro, Kornegay v.	180 N. C., 441	134, 135, 308, 513
Goldsboro, Robinson v.	122 N. C., 211	457
Goldsboro, Rosenthal v.	149 N. C., 128	288
Gooch, S. v.	94 N. C., 982	608
Goode, Martin v.	111 N. C., 288	265
Gooding, Simmons v.	40 N. C., 382	163
Goolsby, Galloway v.	176 N. C., 638	402
Gore v. McPherson	161 N. C., 644	471, 474
Goulden, S. v.	134 N. C., 743	626
Grabbs v. Ins. Co.	125 N. C., 389	490
Graham, Griffin v.	8 N. C., 96	327, 330
Grant v. Grant	109 N. C., 710	420
Grant, Pugh v.	86 N. C., 40	44
Grant, Steele v.	166 N. C., 635	399
Graves v. Howard	159 N. C., 594	42, 68, 91
Gray, Leathers v.	96 N. C., 548	161
Gray, Leathers v.	101 N. C., 163	161
Gray v. Lentz	173 N. C., 346	240
Gray, Siler v.	86 N. C., 566	128
Gray, S. v.	180 N. C., 697	538
Green, Horton v.	64 N. C., 66	294
Green v. Miller	161 N. C., 25	339
Greensboro, Southerland v.	96 N. C., 49	149
Greenville, Harrington v.	159 N. C., 632	385
Greer, S. v.	162 N. C., 649	63
Griffin v. Graham	8 N. C., 96	327, 330
Griffin, Price v.	150 N. C., 523	161
Griffin v. R. R.	138 N. C., 55	298
Griffin v. Water Co.	122 N. C., 208	171
Grocery Co., Oil Co. v.	169 N. C., 521	244
Grocery Co. v. R. R.	136 N. C., 397	254
Grocery Co., Stanford v.	143 N. C., 427	499
Grocery Co., West v.	138 N. C., 166	298
Gross v. Smith	132 N. C., 604	93, 439
Guano Co. v. Livestock Co.	168 N. C., 442, 448	280, 281, 283, 375
Guano Co. v. Tillery	110 N. C., 29	252
Gudger v. White	141 N. C., 507	82
Guilford v. Georgia Co.	112 N. C., 34	388
Guilford v. Porter	167 N. C., 366	81
Guilford v. Porter	170 N. C., 310, 314	268, 269, 270, 289, 290
Guilford v. Porter	171 N. C., 356	268, 269, 270, 289, 290
Guire v. Comrs.	177 N. C., 516	455
Guthrie, Wiggins v.	101 N. C., 661, 678	245, 258, 261, 377

H

Haines, Berry v. 4 N. C., 311 388
Hair v. Downing 96 N. C., 172 31
Hairston, S. v. 121 N. C., 582 589
Hairston v. Stinson 35 N. C., 479 17
Hall v. Castlebury 101 N. C., 153 465
Hall v. Dixon 174 N. C., 319 287
Hall v. Giessell 179 N. C., 657 448, 593
Ham v. Ham 168 N. C., 486 453
Hamby, S. v. 126 N. C., 1066 534
Hamilton, Mauney v. 132 N. C., 306 256
Hamlin v. Tucker 72 N. C., 503 287
Hancock, Abbott v. 123 N. C., 99 415
Hancock v. Davis 179 N. C., 283 468
Hancock v. Wooten 107 N. C., 9 256
Hannon, S. v. 168 N. C., 215 598, 599
Hansley v. R. R. 115 N. C., 603, 607 114, 499
Hardware Co. v. Buggy Co. 167 N. C., 423 373
Hardware Co., Neal v. 122 N. C., 104 316
Hardwood Co., Winslow v. 147 N. C., 275 569
Hardy v. Poole 41 N. C., 28 460
Hargrave v. Comrs. 168 N. C., 626 351
Hargrove, Harrison v. 120 N. C., 96 273
Harrill v. R. R. 132 N. C., 655 565
Harrington v. Greenville 159 N. C., 632 385
Harris, S. v. 166 N. C., 243 547
Harris v. Wright 118 N. C., 422 128
Harrison, Bell v. 179 N. C., 190 464
Harrison v. Hargrove 120 N. C., 96 273
Harrison v. Ward 58 N. C., 236 163
Hart, S. v. 116 N. C., 976, 977 538, 608
Harwood v. Shoe Co. 141 N. C., 161 128
Hassel, Davenport v. 45 N. C., 29 163
Hawes, Newkirk v. 58 N. C., 265, 268 409
Hawkins v. Cedar Works 122 N. C., 87 471
Hay, Clothing Co. v. 163 N. C., 495 270
Hayes, Adams v. 24 N. C., 361 94, 439
Hayes v. Ins. Co. 132 N. C., 702 435
Hayes v. R. R. 141 N. C., 199 153
Heath v. Cotton Mills 115 N. C., 208 70
Heath v. Heath 114 N. C., 547 84
Heggie v. Hill 95 N. C., 303 256
Helms v. Austin 116 N. C., 753 81
Helms v. Holton 152 N. C., 587, 590 25
Helsabeck v. Doub 167 N. C., 206 58
Henry v. Henry 31 N. C., 278 163
Henry v. Hilliard 120 N. C., 479 392
Hickory, Hoyle v. 167 N. C., 619 296
Hicks v. Bullock 96 N. C., 164 81
Hicks v. Skinner 71 N. C., 539 229
High Point, Bradshaw v. 151 N. C., 517 352
Hill, Alston v. 165 N. C., 258 25
Hill, Gates v. 158 N. C., 584 269
Hill, Heggie v. 95 N. C., 303 256

Hill v. R. R.	178	N. C., 607, 612	38, 39, 101, 360
Hilliard, Henry v.	120	N. C., 479	392
Hines, Kimbrough v.	180	N. C., 274	108, 110, 157
Hinkle v. R. R.	109	N. C., 472	156
Hinshaw v. R. R.	118	N. C., 1052, 1055	498
Hobgood v. Hobgood	169	N. C., 485, 489, 491	54, 55, 233
Hocutt v. Wilmington	124	N. C., 214	39
Hodge v. Powell	96	N. C., 64	510
Hodges, Daniel v.	87	N. C., 100	287
Hodges v. Lipscomb	128	N. C., 57	331
Hodges, Robeson v.	105	N. C., 49	248
Hoffman, McDonald v.	153	N. C., 254	273
Holder, S. v.	153	N. C., 608	260
Holland v. Peck	37	N. C., 255	333
Holloman v. Holloman	172	N. C., 835	360
Holloway v. Durham	176	N. C., 550	233
Holly v. Assur. Co.	170	N. C., 4	434
Holmes v. Bullock	178	N. C., 379, 380	249, 370
Holmes v. Carr	172	N. C., 215	471
Holmes v. Holmes	86	N. C., 205, 207	80, 81, 83, 84
Holmes v. Marshall	72	N. C., 37	70
Holmes v. R. R.	94	N. C., 318, 323	499
Holton, Helms v.	152	N. C., 587, 590	25
Homer, Daniels v.	139	N. C., 219	641, 645
Homes v. Mitchell	6	N. C., 228	122
Henofer v. Realty Co.	178	N. C., 584	402
Hood v. Sudderth	111	N. C., 215	417
Hopkins, S. v.	130	N. C., 647	599
Horne v. Power Co.	144	N. C., 378	294
Horton v. Green	64	N. C., 66	294
Hospital, Cooke v.	168	N. C., 256	101
Hosiery Co. v. Cotton Mills	140	N. C., 454	75
House, Pearce v.	4	N. C., 722	471
Houser v. Bonsal	149	N. C., 51	243
Howard, Graves v.	159	N. C., 594	42, 68, 91
Howard v. R. R.	132	N. C., 709	431
Howell v. Howell	162	N. C., 283	414, 415, 416, 420
Howell v. Solomon	167	N. C., 591	415
Howland v. Asheville	174	N. C., 749	385
Hoyle v. Hickory	167	N. C., 619	296
Hudson v. Morton	162	N. C., 6	509
Huffman v. R. R.	163	N. C., 171	115, 116
Hughes v. Clark	134	N. C., 457	340
Hughes, Wilson v.	94	N. C., 182, 187	251, 259, 265
Humphrey, Thompson v.	179	N. C., 52	56
Hunt, Abbott v.	129	N. C., 403	66
Hunt v. R. R.	170	N. C., 442, 444	103, 105, 142
Hunter v. Kelly	92	N. C., 285	470, 509
Hurdle, Outlaw v.	46	N. C., 150	527
Hurst v. Everett	91	N. C., 399, 405	247, 259
Hussey v. R. R.	98	N. C., 34	112
Hutchinson v. R. R.	140	N. C., 123	115, 117
Hux v. Reflector Co.	173	N. C., 97	298
Hyatt, Whitmore v.	175	N. C., 117	186

Hyman v. Devereux ... 65 N. C., 589 ... 183
Hyman, S. v. ... 164 N. C., 411 ... 534

I

Ijames v. McClamrock ... 92 N. C., 362 ... 248
Ingram, Threadgill v. ... 23 N. C., 577 ... 452
In re Application for License ... 143 N. C., 1 ... 642
In re Bennett ... 180 N. C., 5 ... 305, 321
In re Black ... 162 N. C., 458 ... 534
In re Briggs ... 135 N. C., 120 ... 575
In re Ledford ... 176 N. C., 610, 612 ... 305, 321
Institution, School v. ... 117 N. C., 164 ... 331
Ins. Co., Bergeron v. ... 111 N. C., 45 ... 490
Ins. Co., Gerringer v. ... 133 N. C., 414 ... 434
Ins. Co., Grabbs v. ... 125 N. C., 389 ... 490
Ins. Co., Hayes v. ... 132 N. C., 702 ... 435
Ins. Co., Modlin v. ... 151 N. C., 35 ... 434
Ins. Co., Parker v. ... 143 N. C., 339 ... 434
Ins. Co., Whitford v. ... 163 N. C., 223 ... 44
Ins. Co., Wilson v. ... 155 N. C., 173 ... 367
Ivie, Crampton v. ... 126 N. C., 894 ... 105, 108, 142

J

Jackson, Brown v. ... 179 N. C., 365, 375 ... 38
Jackson v. Tel. Co. ... 139 N. C., 347 ... 112, 194
Jackson, Young v. ... 92 N. C., 144 ... 70
Jacobs v. Williams ... 173 N. C., 276 ... 473
Jacobsky, LeRoy v. ... 136 N. C., 443 ... 119
James, Stancill v. ... 126 N. C., 190 ... 510
Janney v. Robbins ... 141 N. C., 400 ... 471
Jarrett v. Trunk Co. ... 144 N. C., 299 ... 62
Jeffreys, S. v. ... 117 N. C., 743 ... 560
Jenkins v. Lambeth ... 172 N. C., 468 ... 409
Jenkins v. R. R. ... 155 N. C., 203 ... 156
Jobbing Co., Basnight v. ... 148 N. C., 350 ... 208
Johnson v. Bell ... 74 N. C., 355 ... 64
Johnson v. Duvall ... 135 N. C., 642 ... 70
Johnson, Furr v. ... 140 N. C., 157 ... 240
Johnson v. Lumber Co. ... 144 N. C., 717 ... 70
Johnson, Lynch v. ... 170 N. C., 110 ... 311
Johnson v. R. R. ... 140 N. C., 580 ... 374
Johnson v. R. R. ... 163 N. C., 442, 443 ... 155, 203
Johnson, S. v. ... 75 N. C., 174 ... 63
Johnson, S. v. ... 94 N. C., 924 ... 235
Johnson, Vanderbilt v. ... 141 N. C., 370 ... 72
Jones v. Brinkley ... 174 N. C., 23 ... 5
Jones v. Call ... 96 N. C., 344, 345 ... 374
Jones, Keaton v. ... 119 N. C., 43 ... 368
Jones v. Myatt ... 153 N. C., 225 ... 122
Jones v. Oliver ... 38 N. C., 369 ... 164, 409
Jones v. Perry ... 38 N. C., 200 ... 124
Jones, S. v. ... 145 N. C., 460 ... 545
Jones, Ward v. ... 40 N. C., 404 ... 162
Jones v. Whichard ... 163 N. C., 241 ... 161, 162, 163

Jones, Williamson v.	127 N. C., 178	366
Jordan, Wilson v.	124 N. C., 683	642
Journigan, Roe v.	175 N. C., 261, 263	181, 183
Journigan, Roe v.	179 N. C., 686	181
Journigan, S. v.	120 N. C., 568	608
Joyner v. Roberts	114 N. C., 389	240
Judd v. Mining Co.	120 N. C., 397	11
Julian v. Daniels	175 N. C., 549	240
Justice, Bank v.	157 N. C., 273, 275	221

K

Kearney v. Vann	154 N. C., 315	451
Keaton v. Jones	119 N. C., 43	368
Keel, Rollins v.	115 N. C., 68	346
Keith v. Lockhart	171 N. C., 451	625
Keith v. Scales	124 N. C., 512	327, 328, 330, 331
Kelly, Hunter v.	92 N. C., 285	470, 509
Kennedy, Piano Co. v.	152 N. C., 197	253
Kennedy, S. v.	169 N. C., 326	553
Kennedy v. Trust Co.	180 N. C., 225, 229	499
Kerr v. Saunders	122 N. C., 635	433
Keys v. Alligood	178 N. C., 16	179
Killian, S. v.	173 N. C., 792	570, 571
Kimbrough v. Hines	180 N. C., 274	108, 110, 157
King, Carter v.	174 N. C., 549	5
King v. Cooper	128 N. C., 347	16, 17
King v. Phillips	95 N. C., 245	441
King v. McRackan	168 N. C., 623, 624	470, 474
King v. R. R.	176 N. C., 306	413
King, S. v.	86 N. C., 603	550
Kinsauls, S. v.	126 N. C., 1095	528
Kittelle, S. v.	110 N. C., 560	587, 643, 644
Knight v. Bridge Co.	172 N. C., 393	464
Koonce, Askew v.	118 N. C., 532	262
Koonce v. Russell	103 N. C., 179	433
Koonce, S. v.	108 N. C., 754	546
Kornegay v. Goldsboro	180 N. C., 441	134, 135, 308, 513
Kornegay v. Morris	122 N. C., 199	346
Kornegay v. Price	178 N. C., 441	467

L

Lamb v. Lamb	177 N. C., 150	31, 32
Lamb v. R. R.	179 N. C., 619	114
Lambeth, Jenkins v.	172 N. C., 468	409
Lance v. Rumbough	150 N. C., 19	403
Land Co., Collins v.	128 N. C., 563	340, 341, 343, 403
Land Co., Conrad v.	126 N. C., 776	340
Land Co., Stagg v.	171 N. C., 583	127
Lane, Fertilizer Co. v.	173 N. C., 184	311
Lane, Withers v.	144 N. C., 184	547
Lanier v. Lumber Co.	177 N. C., 200	311
Lanier v. Pullman Co.	180 N. C., 406	110, 115, 498, 499
Lasater, Oakley v.	172 N. C., 96	6
Lassiter, McCoy v.	94 N. C., 131	608

Laughlin, Coltrane v.	157 N. C., 282	270
Laxton, S. v.	76 N. C., 216	589
Leach, Osborn v.	135 N. C., 628	5
Leak, S. v.	156 N. C., 647	299
Leathers v. Gray	96 N. C., 548	161
Leathers v. Gray	101 N. C., 163	161
Ledford v. Emerson	143 N. C., 527	6
Ledford, *In re*	176 N. C., 610, 612	305, 321
Ledford, S. v.	133 N. C., 714	499
Lee v. Baird	146 N. C., 361	613
Lee, Claus v.	140 N. C., 554	302
Leigh, Vickers v.	104 N. C., 248	81, 82, 84
Lentz, Gray v.	173 N. C., 346	240
LeRoy v. Jacobsky	136 N. C., 443	119
Levin v. Gladstein	142 N. C., 495	252, 370
Lewis, May v.	132 N. C., 115	161, 162, 163, 165
Lewis v. Smith	23 N. C., 146	346
Lewis, S. v.	142 N. C., 626	642
License, *In re* Application for.	143 N. C., 1	642
Lindsey v. Mitchell	174 N. C., 458	360
Linville v. Nissen	162 N. C., 95	216
Lipscomb, Hodges v.	128 N. C., 57	331
Lipscombe, Rhyne v.	122 N. C., 650	244
Lipsitz, Burden v.	166 N. C., 523	54, 55, 408
Lipsitz, Smith v.	178 N. C., 100	413
Livestock Co., Guano Co. v.	168 N. C., 442, 448	280, 281, 283, 375
Livestock Co., Turner v.	179 N. C., 457, 460	262, 605
Lloyd v. R. R.	118 N. C., 1010	102
Lockhart, Keith v.	171 N. C., 451	625
Locklear v. Savage	159 N. C., 237	467
Logan, Anderson v.	105 N. C., 266	84
Long, S. v.	143 N. C., 674	573
Lonon, Armstrong v.	149 N. C., 435	433
Love, Garrett v.	89 N. C., 205, 207	246, 262, 264
Lowe v. Accident Co.	115 N. C., 18	434
Lowery v. School Trustees	140 N. C., 33	388
Lowman v. Ballard	168 N. C., 16	273
Lucas, Puffer v.	112 N. C., 382, 384	252
Lumber Co. v. Branch	158 N. C., 251	430
Lumber Co. v. Buhman	160 N. C., 385	273
Lumber Co., Coles v.	150 N. C., 183	374
Lumber Co., Johnson v.	144 N. C., 717	70
Lumber Co., Lanier v.	177 N. C., 200	311
Lumber Co., Mfg. Co. v.	159 N. C., 510	28
Lumber Co., Mercer v.	173 N. C., 49	433
Lumber Co., Mitchell v.	169 N. C., 397	8, 11
Lumber Co., Nicholson v.	156 N. C., 59, 68	527
Lumber Co. v. R. R.	151 N. C., 221	294
Lumber Co., Smith v.	155 N. C., 389	55
Lumber Co., S. v.	109 N. C., 860	585
Lumber Co., Stewart v.	146 N. C., 47	116, 499
Lumber Co., Thompson v.	168 N. C., 226	15, 16
Lumber Co., Weston v.	160 N. C., 263, 268	72, 311
Lumber Co., Weston v.	162 N. C., 165, 180	17, 408

Lumber Co., Weston v. 169 N. C., 398 17
Lumber Co., Whitlock v. 145 N. C., 120 128
Lutz v. Thompson 87 N. C., 334 247
Lynch v. Johnson 170 N. C., 110 311
Lynch v. Mfg. Co. 167 N. C., 99 295
Lynn v. Cotton Mills 130 N. C., 621 250, 253, 257
Lytle, S. v. 138 N. C., 738, 746 244, 545

M

Machine Co., Garrison v. 159 N. C., 285 209
Machine Co., Slaughter v. 148 N. C., 472 259
Machine Co. v. Tobacco Co. 141 N. C., 284, 289, 290 373, 375
McAdoo v. Callum 86 N. C., 419 247
McBrayer, Ford v. 171 N. C., 421 161
McCall v. Zachary 131 N. C., 466 253
McCaskill, R. R. v. 98 N. C., 526 48, 50
McClamrock, Ijames v. 92 N. C., 362 248
McClenahan v. Cotten 83 N. C., 332 245, 259, 264
McComb, Williams v. 38 N. C., 450 122
McConnell v. McConnell 64 N. C., 342 89
McCormick, Patterson v. 177 N. C., 448 312
McCourry, S. v. 128 N. C., 594 565
McCoy v. Lassiter 94 N. C., 131 608
McDonald v. Hoffman 153 N. C., 254 273
McDonald, McLean v. 173 N. C., 429 269
McDowell v. Construction Co. 96 N. C., 514 149
McGill, Carter v. 168 N. C., 507 280, 281, 282
McGill, Carter v. 171 N. C., 775 280, 281
McGloughan v. Mitchell 126 N. C., 683 641
McGovern v. R. R. 180 N. C., 219 101
McIlhenny v. Wilmington 127 N. C., 146, 149 195, 385
McIntyre, McLaurin v. 167 N. C., 350 248
McIver, S. v. 175 N. C., 761 538
McIver, S. v. 176 N. C., 718 518
McKee v. Angel 90 N. C., 60 273
McKenzie v. McKenzie 153 N. C., 242 231
McKinney v. Matthews 166 N. C., 580 208
McKinney v. Patterson 174 N. C., 483 6
McKinnon v. Morrison 104 N. C., 354 252
McLaurin v. McIntyre 167 N. C., 350 248
McLawhorn, Fertilizer Wks. v. 158 N. C., 274 280, 283
McLean v. McDonald 173 N. C., 429 269
McLendon, Allen v. 113 N. C., 319 608
McLeod v. Bullard 84 N. C., 516 464
McLeod, S. v. 8 N. C., 344 529
McMahan v. Spruce Co. 180 N. C., 636 528, 593
McMillan v. R. R. 172 N. C., 853 142
McNeill, Murphy v. 82 N. C., 224 243
McNeill v. R. R. 167 N. C., 396 102
McPherson, Gore v. 161 N. C., 644 471, 474
McRackan, King v. 168 N. C., 623, 624 470, 474
Malloy v. Acheson 179 N. C., 95 55
Malloy v. Bruden 86 N. C., 251 473
Mann v. Transportation Co. 176 N. C., 107 302

Manning v. Manning 79 N. C., 293 68
Mfg. Co., Bogert v. 172 N. C., 248 433
Mfg. Co. v. Lumber Co. 159 N. C., 510 28
Mfg. Co., Lynch v. 167 N. C., 99 295
Mfg. Co. v. Oil Co. 150 N. C., 150 375
Mfg. Co. v. Summers 143 N. C., 102 186
Marks v. Cotton Mills 135 N. C., 289 295
Marshall, Holmes v. 72 N. C., 37 70
Martin, Davis v. 146 N. C., 281 119
Martin v. Goode 111 N. C., 288 265
Martin Co. v. Trust Co. 178 N. C., 26 422
Massey, S. v. 86 N. C., 658 560
Matthews, Askew v. 175 N. C., 187 93, 439
Matthews v. Fry 141 N. C., 582 16
Matthews, McKinney v. 166 N. C., 580 208
Mauney v. Hamilton 132 N. C., 306 256
May v. Lewis 132 N. C., 115 161, 162, 163, 165
May, Sprunt v. 156 N. C., 388 221
May, S. v. 132 N. C., 1021 599
Mayho v. Cotton 69 N. C., 289 288
Mebane v. Mebane 36 N. C., 403 366
Medlock v. Powell 96 N. C., 499 94, 439
Mercer v. Lumber Co. 173 N. C., 49 433
Meredith v. R. R. 137 N. C., 478 254
Meroney, Cherokee Co. v. 173 N. C., 655 208
Mesic v. R. R. 120 N. C., 490 102
Midgett v. Vann 158 N. C., 130 183
Miller, Green v. 161 N. C., 25 339
Miller, Patterson v. 72 N. C., 516 183
Miller, S. v. 94 N. C., 902 608
Mills v. Comrs. 175 N. C., 215 134, 135, 308, 350
Mills v. Deaton 170 N. C., 386 266
Mills, Patterson v. 121 N. C., 258 473
Mills v. R. R. 119 N. C., 693 9
Mills v. Thorne 95 N. C., 362 162
Mining Co. v. Cotton Mills 143 N. C., 307 363
Mining Co., Dorsey v. 177 N. C., 60 509
Mining Co., Judd v. 120 N. C., 397 11
Mintz v. Russ 161 N. C., 538 311
Mitchell, Homes v. 6 N. C., 228 122
Mitchell, Lindsey v. 174 N. C., 458 360
Mitchell v. Lumber Co. 169 N. C., 397 8, 11
Mitchell, McGloughan v. 126 N. C., 683 641
Mitchell, S. v. 119 N. C., 784 617
Modlin v. Ins. Co. 151 N. C., 35 434
Moffitt v. Asheville 103 N. C., 237 385
Monds v. Dunn 163 N. C., 110 294
Moore v. Bank 173 N. C., 183 253
Moore v. Barrow 24 N. C., 437 346
Moore v. Moore 130 N. C., 335 229, 230
Moore v. Quince 109 N. C., 92 81, 84
Moore, Robeson v. 168 N. C., 389 161
Moore, S. v. 129 N. C., 501 518
Morarity v. Traction Co. 154 N. C., 586 498

Mordecai v. Devereux 74 N. C., 673 183
Morehead, Smith v. 59 N. C., 360 228, 229
Morgan, Cobb v. 83 N. C., 211 252
Morgan, Puckett v. 158 N. C., 344 162, 163
Morgan, Tomlinson v. 166 N. C., 557 280
Morris, Davis v. 132 N. C., 435 340
Morris, Kornegay v. 122 N. C., 199 346
Morrison, McKinnon v. 103 N. C., 354 252
Morse, Simmons v. 51 N. C., 6 5
Morton, Hudson v. 162 N. C., 6 509
Morton v. Tel. Co. 130 N. C., 299 205
Mott v. Comrs. 126 N. C., 866, 871 244, 247, 248
Mull, Brittain v. 91 N. C., 498 371
Mullis, Staton v. 92 N. C., 627 473
Murphy v. McNeill 82 N. C., 224 243
Murphy, S. v. 157 N. C., 615 119
Muse v. Assur. Co. 108 N. C., 240 434
Myatt, Jones v. 153 N. C., 225 122
Mystic Circle, Faulk v. 171 N. C., 302 434

N

Nash v. R. R. 67 N. C., 413 403
Navigation Co. v. Wilcox 52 N. C., 481 128
Neal v. Hardware Co. 122 N. C., 104 316
Newell, Snider v. 132 N. C., 614 623, 624, 415
Newkirk v. Hawes 58 N. C., 265, 268 409
Newman v. Bost 122 N. C., 524 93, 94, 439
Newsom, S. v. 27 N. C., 250 575
Newsome, Foil v. 138 N. C., 115 122
Newton v. Texas Co. 180 N. C., 561 399
Nichols v. Freeman 33 N. C., 99 119
Nichols v. Gladden 117 N. C., 497 161
Nicholson v. Lumber Co. 156 N. C., 59, 68 527
Nissen, Linville v. 162 N. C., 95 216
Nobles v. Nobles 177 N. C., 245 161
Norman v. R. R. 167 N. C., 533 202
Norman, S. v. 153 N. C., 591 518
Norment v. Charlotte 85 N. C., 387 149
Norris v. Durfey 168 N. C., 325 122
Norris v. R. R. 152 N. C., 513, 515 103
Norton v. R. R. 122 N. C., 929 155
Norwood, Scarlett v. 115 N. C., 284 415, 418
Norwood v. Totten 166 N. C., 648 89, 470
Notion Co., Thompson v. 160 N. C., 519 273
Noville v. Dew 94 N. C., 44 243

O

Oakley v. Lasater 172 N. C., 96 6
Oakley, S. v. 176 N. C., 755 538
Oil Co. v. Grocery Co. 169 N. C., 521 244
Oil Co., Mfg. Co. v. 150 N. C., 150 375
O'Kelly v. Williams 84 N. C., 281 42
Oliver, Jones v. 38 N. C., 369 164, 409
Orr, Duckworth v. 126 N. C., 674 439

Osborn v. Leach	135 N. C., 628	5
Osborne v. Durham	157 N. C., 263	221
Osborne v. Wilkes	108 N. C., 651	530
Outlaw v. Hurdle	46 N. C., 150	527
Outlaw, Todd v.	79 N. C., 235	311
Overman, Clancy v.	18 N. C., 402	128

P

Pace, Vincent v.	178 N. C., 421	152
Page, Carman v.	59 N. C., 37	464
Page v. Foust	89 N. C., 447	122
Page, S. v.	127 N. C., 512	561
Paine v. Forney	128 N. C., 237	327, 328
Palmer v. R. R.	131 N. C., 250	116, 224, 227
Palmer, Southern Assembly v.	166 N. C., 75	135
Paper Co. v. Chronicle	115 N. C., 147	608
Park v. Exum	156 N. C., 228	547
Parker, Briscoe v.	145 N. C., 14	32
Parker, Cromartie v.	121 N. C., 198	205
Parker v. Fenwick	138 N. C., 209	375
Parker v. Ins. Co.	143 N. C., 339	434
Parker v. R. R.	181 N. C., 95	39
Parker, S. v.	106 N. C., 711	420
Patterson v. McCormick	177 N. C., 448	312
Patterson, McKinney v.	174 N. C., 483	6
Patterson v. Miller	72 N. C., 516	183
Patterson v. Mills	121 N. C., 258	473
Patterson, S. v.	134 N. C., 617	575
Patterson v. Trust Co.	157 N. C., 13	93, 439
Peanut Co. v. R. R.	155 N. C., 148, 164	316, 319
Pearce v. House	4 N. C., 722	471
Peck, Holland v.	37 N. C., 255	333
Pendergraph v. Express Co.	178 N. C., 344	316
Pennell v. Robinson	164 N. C., 257	186
Penninger v. R. R.	170 N. C., 473	157
Perkinson, Yellowday v.	167 N. C., 147	246, 258, 259, 262
Perry, Jones v.	38 N. C., 200	124
Perry v. Perry	99 N. C., 273	89, 471
Perry v. R. R.	180 N. C., 290, 299	155, 157, 202, 204
Peterson v. Webb	39 N. C., 56	163, 164
Petit v. Woodlief	115 N. C., 125	433
Phelps, S. v.	65 N. C., 450	585
Phifer v. Comrs.	157 N. C., 150	508
Phifer, Edwards v.	120 N. C., 405	101
Phifer v. Erwin	100 N. C., 65	550
Phifer v. R. R.	122 N. C., 940	299
Phillips, King v.	95 N. C., 245	441
Phillips, Rexford v.	159 N. C., 213	16
Piano Co. v. Kennedy	152 N. C., 197	253
Piano Co. v. Spruill	150 N. C., 168	311
Picot v. Sanderson	12 N. C., 309	94
Pilcher, Falkner v.	137 N. C., 449	231
Pipe Co., Alley v.	159 N. C., 328	294
Pipkin, Cheese Co. v.	155 N. C., 394, 396	245, 246, 247, 263, 367

Pleasants, Bridges v. 39 N. C., 26 332
Poole, Hardy v. 41 N. C., 28 460
Pope, Wilson v. 175 N. C., 490 216
Porter, Guilford v. 167 N. C., 366 81
Porter, Guilford v. 170 N. C., 310, 314 268, 269, 270, 289, 290
Porter, Guilford v. 171 N. C., 356 268, 269, 270, 289, 290
Powell v. Allen 103 N. C., 49 261
Powell, Chancey v. 103 N. C., 159 471
Powell v. Dail 172 N. C., 261 288
Powell, Hodge v. 96 N. C., 64 510
Powell, Medlock v. 96 N. C., 499 94, 439
Powell v. R. R. 178 N. C., 243 297
Powell v. Woodcock 149 N. C., 235 122
Power Co., Borden v. 174 N. C., 73 613
Power Co., Cameron v. 137 N. C., 101 608
Power Co., Campbell v. 166 N. C., 488 205
Power Co., Horne v. 144 N. C., 378 294
Power Co., Public-Service Co. v. 179 N. C., 18, 32, 38 171, 176
Power Co., R. R. v. 180 N. C., 422 171
Powers v. R. R. 166 N. C., 602 102
Poythress, S. v. 174 N. C., 809 534
Pratt v. Chaffin 136 N. C., 350 209
Price v. Edwards 178 N. C., 503 448
Price v. Griffin 150 N. C., 523 161
Price, Kornegay v. 178 N. C., 441 467
Price, S. v. 175 N. C., 804 534
Pridgen, Council v. 153 N. C., 444 467, 473
Pritchard v. Williams 175 N. C., 319 47, 78
Pritchard v. Williams 176 N. C., 108, 110 47, 77, 78
Pritchard v. Williams 178 N. C., 444 47, 78
Proctor v. Finley 119 N. C., 541 411
Proctor, Smith v. 139 N. C., 314, 319, 324 80, 81, 83, 84, 89, 162, 264
Pruden, Comrs. v. 178 N. C., 394 350
Pruden v. R. R. 121 N. C., 511 433
Public-Service Co. v. Power Co. 179 N. C., 18, 32, 38 171, 176
Public-Service Corp., Wood v. 174 N. C., 697 224
Publishing Co., S. v. 179 N. C., 720 534
Puckett v. Morgan 158 N. C., 344 162, 163
Puffer v. Lucas 112 N. C., 382, 384 252
Pugh v. Allen 179 N. C., 309 346
Pugh v. Grant 86 N. C., 40 44
Pulliam, Ricks v. 94 N. C., 225 81
Pullman Co., Lanier v. 180 N. C., 406 110, 115, 498, 499
Purnell v. R. R. 122 N. C., 832, 840 102

Q

Quick, S. v. 72 N. C., 243 546
Quince, Moore v. 109 N. C., 89, 92 81, 84
Quinnerly v. Quinnerly 114 N. C., 145 311

R

Rackley v. Chestnutt 110 N. C., 262 81, 84
Rackley v. Roberts 147 N. C., 201 273

R. R., Adams v. ....110 N. C., 325........ 425
R. R., Allen v. ....149 N. C., 260........ 102
R. R., Allen v. ....171 N. C., 339........ 311
R. R., Ammons v. ....138 N. C., 559........ 499
R. R., Ammons v. ....140 N. C., 198........ 499
R. R., Bagwell v. ....167 N. C., 611, 615, 616........ 103, 105, 108, 142, 143, 202
R. R., Baker v. ....144 N. C., 37, 44........ 103, 105, 142
R. R., Basnight v. ....111 N. C., 592........ 382
R. R., Bell v. ....163 N. C., 180........ 383
R. R., Boney v. ....145 N. C., 248........ 101
R. R., Britt v. ....148 N. C., 37, 40, 41........ 104, 294, 298, 299
R. R., Britton v. .... 88 N. C., 536, 544........ 115, 194
R. R., Bucken v. ....157 N. C., 443........ 193
R. R., Bumgardner v. ....132 N. C., 440........ 565
R. R., Burton v. .... 84 N. C., 197........ 62
R. R., Clements v. ....179 N. C., 225........ 101
R. R., Cobb v. ....175 N. C., 132........ 153
R. R. v. Comrs. .... 72 N. C., 486........ 148
R. R. v. Comrs. ....108 N. C., 56........ 136
R. R., Cooper v. ....170 N. C., 490........ 112
R. R., Cook v. ....128 N. C., 336........ 193
R. R., Cox v. ....166 N. C., 652........ 38
R. R., Culbreth v. ....169 N. C., 725........ 301
R. R., Daniel v. ....117 N. C., 592........ 115, 116, 194
R. R., Deans v. ....107 N. C., 686........ 204
R. R., Dunn v. ....174 N. C., 258........ 102
R. R., Duval v. ....134 N. C., 331, 333........ 103, 105, 142
R. R., Edwards v. ....132 N. C., 99........ 109
R. R., Efland v. ....146 N. C., 135........ 389, 541
R. R., Foard v. .... 53 N. C., 235........ 374
R. R., Gilliam v. ....179 N. C., 508........ 101
R. R., Goff v. ....179 N. C., 219, 220........ 202, 203
R. R., Griffin v. ....138 N. C., 55........ 298
R. R., Grocery Co. v. ....136 N. C., 397........ 254
R. R., Hansley v. ....115 N. C., 603, 607........ 114, 499
R. R., Harrill v. ....132 N. C., 655........ 565
R. R., Hayes v. ....141 N. C., 199........ 153
R. R., Hill v. ....178 N. C., 607, 612........ 38, 39, 101, 360
R. R., Hinkle v. ....109 N. C., 472........ 156
R. R., Hinshaw v. ....118 N. C., 1052, 1055........ 498
R. R., Holmes v. .... 94 N. C., 318, 323........ 499
R. R., Howard v. ....132 N. C., 709........ 431
R. R., Huffman v. ....163 N. C., 171........ 115, 116
R. R., Hunt v. ....170 N. C., 442, 444........ 103, 105, 142
R. R., Hussey v. .... 98 N. C., 34........ 112
R. R., Hutchinson v. ....140 N. C., 123........ 115, 117
R. R., Jenkins v. ....155 N. C., 203........ 156
R. R., Johnson v. ....140 N. C., 580........ 374
R. R., Johnson v. ....163 N. C., 442, 443........ 155, 203
R. R., King v. ....176 N. C., 306........ 413
R. R., Lamb v. ....179 N. C., 619........ 114
R. R., Lloyd v. ....118 N. C., 1010........ 102
R. R., Lumber Co. v. ....151 N. C., 221........ 294

R. R. v. McCaskill 98 N. C., 526 48, 50
R. R., McGovern v. 180 N. C., 219 101
R. R., McMillan v. 172 N. C., 853 142
R. R., McNeill v. 167 N. C., 396 102
R. R., Meredith v. 137 N. C., 478 254
R. R., Mesic v. 120 N. C., 490 102
R. R., Mills v. 119 N. C., 693 9
R. R., Nash v. 67 N. C., 413 403
R. R., Norman v. 167 N. C., 533 202
R. R., Norris v. 152 N. C., 513, 515 103
R. R., Norton v. 122 N. C., 929 155
R. R., Palmer v. 131 N. C., 250 116, 224, 227
R. R., Parker v. 181 N. C., 95 39
R. R., Peanut Co. v. 155 N. C., 148, 164 316, 319
R. R., Penninger v. 170 N. C., 473 157
R. R., Perry v. 180 N. C., 290, 299 155, 157, 202, 204
R. R., Phifer v. 122 N. C., 940 299
R. R., Powell v. 178 N. C., 243 297
R. R. v. Power Co. 180 N. C., 422 171
R. R., Powers v. 166 N. C., 602 102
R. R., Pruden v. 121 N. C., 511 433
R. R., Purnell v. 122 N. C., 832, 840 102
R. R. v. R. R. 147 N. C., 368 128
R. R., Raper v. 126 N. C., 563 142
R. R., Ramsbottom v. 138 N. C., 38 477
R. R. v. Reidsville 109 N. C., 497 379
R. R., Renn v. 170 N. C., 128, 141 299
R. R., Ridge v. 167 N. C., 510 399
R. R., Ridley v. 118 N. C., 996 425
R. R., Roberts v. 143 N. C., 179 193
R. R., Robertson v. 148 N. C., 324 254
R. R., Russell v. 118 N. C., 1109 102
R. R., Sawyer v. 142 N. C., 1 112, 116
R. R., Seawell v. 132 N. C., 856, 859 114, 194
R. R., Seawell v. 133 N. C., 517 195
R. R., Seward v. 159 N. C., 241 112
R. R., Sharpe v. 130 N. C., 613 374
R. R., Shepard v. 166 N. C., 539, 544 105, 156
R. R., Shepherd v. 163 N. C., 518 102
R. R., Smith v. 163 N. C., 146 411
R. R., Speight v. 161 N. C., 87 183
R. R., Spencer v. 166 N. C., 522 38
R. R., Staton v. 144 N. C., 145 38
R. R., Stone v. 144 N. C., 220 534
R. R., Strother v. 123 N. C., 197, 199 115, 116, 430
R. R., Summerlin v. 133 N. C., 550 295
R. R., Tate v. 168 N. C., 523 142
R. R., Thomas v. 173 N. C., 494 114
R. R., Tillett v. 115 N. C., 665 114
R. R., Tillett v. 166 N. C., 520 411
R. R., Utley v. 119 N. C., 720 471
R. R., Vann v. 180 N. C., 659 101
R. R., Wallace v. 174 N. C., 174 116
R. R., Wells v. 51 N. C., 47 382

R. R., White v. 115 N. C., 631 115
R. R., Williams v. 144 N. C., 498, 502 115, 116, 256
R. R., Williams v. 153 N. C., 360 39
R. R., Wilson v. 142 N. C., 340 499
R. R., Wilson v. 165 N. C., 499 231
R. R., Young v. 157 N. C., 78 411
Raisin v. Thomas 88 N. C., 148 259
Ramsbottom v. R. R. 138 N. C., 38 477
Raper v. R. R. 126 N. C., 563 142
Reade v. Durham 173 N. C., 668 134
Real Estate Co. v. Bland 152 N. C., 225 84
Real Estate Co. v. Sasser 179 N. C., 497 66
Realty Co., Henofer v. 178 N. C., 584 402
Reams, S. v. 121 N. C., 556 576
Reaves, Carter v. 167 N. C., 131 91
Redmond v. Burroughs 63 N. C., 242 163
Reeves v. Reeves 16 N. C., 386 122
Reflector Co., Hux v. 173 N. C., 97 298
Reich v. Cone 180 N. C., 267 218
Reidsville, Allen v. 178 N. C., 513 448
Reidsville, R. R. v. 109 N. C., 497 379
Reiger v. Worth 127 N. C., 230 374
Renn v. R. R. 170 N. C., 128, 141 299
Rexford v. Phillips 159 N. C., 213 16
Reynolds v. Express Co. 172 N. C., 487 119
Rhyne v. Lipscombe 122 N. C., 650 244
Rice, S. v. 76 N. C., 194 414
Ricks v. Pulliam 94 N. C., 225 81
Ridge v. R. R. 167 N. C., 510 399
Ridley v. R. R. 118 N. C., 996 425
Ring, Brewer v. 177 N. C., 476, 484 35, 297
Ritchie, S. v. 107 N. C., 857 235
Ritter, Blue v. 118 N. C., 580 124
Rives v. Frizzle 43 N. C., 237 409
Robbins, Janney v. 141 N. C., 400 471
Roberts, Joyner v. 114 N. C., 389 240
Roberts, Rackley v. 147 N. C., 201 273
Roberts v. R. R. 143 N. C., 179 193
Robertson v. R. R. 148 N. C., 324 254
Robertson, S. v. 166 N. C., 356 594
Robeson v. Hodges 105 N. C., 49 248
Robeson v. Moore 168 N. C., 389 161
Robinson v. Brotherhood 170 N. C., 545 490
Robinson, Caldwell v. 179 N. C., 518 509
Robinson v. Goldsboro 122 N. C., 211 457
Robinson, Pennell v. 164 N. C., 257 186
Robinson v. Robinson 123 N. C., 137 68
Roe v. Journigan 175 N. C., 261, 263 181, 183
Roe v. Journigan 179 N. C., 686 181
Rogers, S. v. 173 N. C., 755 547
Rollins v. Keel 115 N. C., 68 346
Roseman v. Roseman 127 N. C., 497 371
Roseman, Shell v. 155 N. C., 90 227
Rosemond, Webb v. 172 N. C., 848 360

Rosenthal v. Goldsboro	149 N. C., 128	388
Ross, S. v.	76 N. C., 242	229
Rosser v. Bynum	168 N. C., 340	433
Rountree, Carter v.	109 N. C., 29	273
Rozier, Gallup v.	172 N. C., 283	186, 188
Rudasill v. Falls	92 N. C., 222	221
Rumbough, Lance v.	150 N. C., 19	403
Russ, Mintz v.	161 N. C., 538	311
Russell, Koonce v.	103 N. C., 179	433
Russell v. R. R.	118 N. C., 1109	102
Rutledge v. Smith	45 N. C., 283	84

S

Sain v. Baker	128 N. C., 256	346
Saleeby, Armfield Co. v.	178 N. C., 298	186
Sanderson, Picot v.	12 N. C., 309	94
Sasser, Real Estate Co. v.	179 N. C., 497	66
Satterthwaite, Fortescue v.	23 N. C., 566	347
Saunders, Kerr v.	122 N. C., 635	433
Savage, Locklear v.	159 N. C., 237	467
Sawyer v. R. R.	142 N. C., 1, 112	116
Scales, Keith v.	124 N. C., 512	327, 328, 330, 331
Scarlett v. Norwood	115 N. C., 285	415, 418
Schas v. Assur. Soc.	170 N. C., 420	35
School v. Institution	117 N. C., 164	331
School Trustees, Lowery v.	140 N. C., 33	388
Seals v. Seals	165 N. C., 409	89
Seawell v. Bunch	51 N. C., 195	471
Seawell v. R. R.	132 N. C., 856, 859	114, 194
Seawell v. R. R.	133 N. C., 517	195
Security Co., Taylor v.	145 N. C., 385	299
Seward v. R. R.	159 N. C., 241	112
Sexton v. Elizabeth City	169 N. C., 385	311, 339
Shaft, S. v.	166 N. C., 407	515
Sharpe v. R. R.	130 N. C., 613	374
Shell v. Aiken	155 N. C., 212	251, 265
Shell v. Roseman	155 N. C., 90	227
Shelton v. White	163 N. C., 90	12
Shemwell, S. v.	180 N. C., 718	613
Shepard v. R. R.	166 N. C., 339, 344	105, 156
Shepherd v. R. R.	163 N. C., 518	102
Shermer v. Dobbins	176 N. C., 549	467
Shoe Co., Harwood v.	141 N. C., 161	128
Shoe Store Co. v. Wiseman	174 N. C., 716	244
Shoffner, Coble v.	75 N. C., 43	641
Siler v. Gray	86 N. C., 566	128
Simmons, Blackledge v.	180 N. C., 535	162
Simmons v. Gooding	40 N. C., 382	163
Simmons v. Morse	51 N. C., 6	5
Simms v. Vick	151 N. C., 78	129
Skinner, Hicks v.	71 N. C., 539	229
Skinner v. Thomas	171 N. C., 98	642, 643
Slaughter v. Machine Co.	148 N. C., 472	259
Slaughter, Wilkes v.	10 N. C., 211	236

Smallwood, S. v.	78 N. C., 560	529
Smathers v. Comrs.	125 N. C., 480	352
Smathers v. Gilmer	126 N. C., 757	402
Smathers, Stevens v.	123 N. C., 499	360
Smith v. Allen	112 N. C., 226	471
Smith, Admr., v. Downey	38 N. C., 268	441
Smith v. French	141 N. C., 2, 6	246, 254, 258, 264
Smith, Gross v.	132 N. C., 604	93, 439
Smith, Lewis v.	23 N. C., 146	346
Smith, Lipsitz v.	178 N. C., 100	413
Smith v. Lumber Co.	155 N. C., 389	55
Smith v. Morehead	59 N. C., 360	228, 229
Smith v. Proctor	139 N. C., 314, 319, 324	80, 81, 83, 84, 89, 162, 264
Smith v. R. R.	163 N. C., 146	411
Smith, Rutledge v.	45 N. C., 283	84
Smith, S. v.	103 N. C., 410	533
Smith, S. v.	136 N. C., 684	560, 561
Smith, S. v.	157 N. C., 578	548
Smith, S. v.	164 N. C., 476	35, 599
Smith, Thompson v.	156 N. C., 345	509
Smith v. Wilkins	164 N. C., 136	389, 541
Smithwick v. Ward	52 N. C., 64	153
Smithwick v. Williams	30 N. C., 268	641
Snider v. Newell	132 N. C., 614, 623, 624	415
Snipes v. Wood	179 N. C., 349	240
Snuggs, Comrs. v.	121 N. C., 394	455
Solomon, Howell v.	167 N. C., 591	415
Somers, Boggan v.	152 N. C., 390	84
Sondley v. Asheville	112 N. C., 694	391
Sons and Daughters of Liberty, Carden v.	179 N. C., 399	490
Sorrell, Edwards v.	150 N. C., 715	260
Southerland v. Greensboro	96 N. C., 49	149
Southerland, S. v.	178 N. C., 676	526, 604
Southern Assembly v. Palmer	166 N. C., 75	135
Southport v. Stanley	125 N. C., 464	290
Southwick, Woodworking Co. v.	119 N. C., 611	392
Sparks, Comrs. v.	179 N. C., 581	248
Speight v. R. R.	161 N. C., 87	183
Speller, S. v.	86 N. C., 697	575
Spencer v. R. R.	166 N. C., 522	38
Spencer v. Spencer	163 N. C., 88	322
Spivey, S. v.	151 N. C., 678	620
Sprinkle, Dougherty v.	88 N. C., 300	367
Sprinkle v. Wellborn	140 N. C., 163	89, 186
Spruce Co., McMahan v.	180 N. C., 636	528, 593
Spruill, Piano Co. v.	150 N. C., 168	311
Sprunt v. May	156 N. C., 388	221
Stadiem, Brittingham v.	151 N. C., 300	217
Stagg v. Land Co.	171 N. C., 583	127
Stancill v. James	126 N. C., 190	510
Stancill, S. v.	178 N. C., 683	298
Stanford v. Grocery Co.	143 N. C., 427	499

Stanley, Southport v. 125 N. C., 464 290
S. v. Adams 133 N. C., 671 560
S. v. Alley 180 N. C., 663 569
S. v. Alphin 81 N. C., 566 528
S. v. Anderson 80 N. C., 429 243
S. v. Austin 79 N. C., 626 62
S. v. Baker 106 N. C., 758 533
S. v. Baldwin 178 N. C., 687, 693 519, 604
S. v. Barco 150 N. C., 792 44
S. v. Barrett 138 N. C., 630 569
S. v. Baskerville 141 N. C., 811 244
S. v. Bean 175 N. C., 749 569
S. v. Behrman 114 N. C., 804 617
S. v. Bennett 93 N. C., 503 528
S. v. Benton 19 N. C., 196 64
S. v. Best 111 N. C., 638 529
S. v. Blackley 138 N. C., 622 573
S. v. Boone 132 N. C., 1108 576
S. v. Brady 177 N. C., 587 516
S. v. Burnett 142 N. C., 581 418
S. v. Burnett 179 N. C., 735 389, 541, 555
S. v. Burton 138 N. C., 578 572, 573
S. v. Caldwell 112 N. C., 854 585
S. v. Carlson 171 N. C., 818 538
S. v. Cathey 170 N. C., 794 534
S. v. Cauble 70 N. C., 62 533
S. v. Chisenhall 106 N. C., 676 418
S. v. Christianbury 44 N. C., 46 551
S. v. Collins 30 N. C., 407 64
S. v. Connor 142 N. C., 700, 701 573, 626
S. v. Cook 162 N. C., 586 547
S. v. Cox 150 N. C., 846 619, 620
S. v. Crews 128 N. C., 581 515
S. v. Crook 91 N. C., 536, 540 533, 546
S. v. Currie 161 N. C., 276 533
S. v. Daniel 87 N. C., 507 589
S. v. Davis 79 N. C., 603 598
S. v. DeBerry 123 N. C., 703 560
S. v. Debnam 98 N. C., 712 608
S. v. Dick 60 N. C., 440 547
S. v. Doster 157 N. C., 634 244
S. v. Earnhardt 170 N. C., 725, 727 625
S. v. Edwards 86 N. C., 666 170
S. v. Exum 138 N. C., 599, 602 519
S. v. Finger 131 N. C., 781 526
S. v. Fink 179 N. C., 712 379
S. v. Fisher 117 N. C., 733 340
S. v. Fore 180 N. C., 744 506, 627
S. v. Foster 130 N. C., 666, 675 589, 595
S. v. Freeman 146 N. C., 615 518
S. v. Fuller 114 N. C., 885 530
S. v. Gash 177 N. C., 595 538
S. v. Gay 94 N. C., 821 608
S. v. George 93 N. C., 567 418

S. v. Gerard .... 37 N. C., 210 331
S. v. Gillikin ....114 N. C., 832 534
S. v. Goings .... 98 N. C., 766 585
S. v. Gooch .... 94 N. C., 982 608
S. v. Goulden ....134 N. C., 743 626
S. v. Gray ....180 N. C., 697 538
S. v. Greer ....162 N. C., 649 63
S. v. Hairston ....121 N. C., 582 589
S. v. Hamby ....126 N. C.,1066 534
S. v. Hannon ....168 N. C., 215 ....598, 599
S. v. Harris ....166 N. C., 243 547
S. v. Hart ....116 N. C., 976, 977 ....538, 608
S. v. Holder ....153 N. C., 608 260
S. v. Hopkins ....130 N. C., 647 599
S. v. Hyman ....164 N. C., 411 534
S. v. Jeffreys ....117 N. C., 743 560
S. v. Johnson .... 75 N. C., 174 63
S. v. Johnson .... 94 N. C., 924 235
S. v. Jones ....145 N. C., 460 545
S. v. Journigan ....120 N. C., 568 608
S. v. Kennedy ....169 N. C., 326 553
S. v. Killian ....173 N. C., 792 ....570, 571
S. v. King .... 86 N. C., 603 550
S. v. Kinsauls ....126 N. C.,1095 528
S. v. Kittelle ....110 N. C., 560 ....587, 643, 644
S. v. Koonce ....108 N. C. 754 546
S. v. Laxton .... 76 N. C., 216 589
S. v. Leak ....156 N. C., 647 299
S. v. Ledford ....133 N. C., 714 499
S. v. Lewis ....142 N. C., 626 642
S. v. Long ....143 N. C., 674 573
S. v. Lumber Co. ....109 N. C., 860 585
S. v. Lytle ....138 N. C., 738, 746 ....244, 545
S. v. McCourry ....128 N. C., 594 565
S. v. McIver ....175 N. C., 761 538
S. v. McIver ....176 N. C., 718 518
S. v. McLeod .... 8 N. C., 344 529
S. v. Massey .... 86 N. C., 658 560
S. v. May ....132 N. C.,1021 599
S. v. Miller .... 94 N. C., 902 608
S. v. Mitchell ....119 N. C., 784 617
S. v. Moore ....129 N. C., 501 518
S. v. Murphy ....157 N. C., 615 119
S. v. Newsom .... 27 N. C., 250 575
S. v. Norman ....153 N. C., 591 518
S. v. Oakley ....176 N. C., 755 538
S. v. Page ....127 N. C., 512 561
S. v. Parker ....106 N. C., 711 420
S. v. Patterson ....134 N. C., 617 575
S. v. Phelps .... 65 N. C., 450 585
S. v. Poythress ....174 N. C., 809 534
S. v. Price ....175 N. C., 804 534
S. v. Pub. Co. ....179 N. C., 720 534
S. v. Quick .... 72 N. C., 243 546

S. v. Reams	121 N. C., 556	576
S. v. Rice	76 N. C., 194	414
S. v. Ritchie	107 N. C., 857	235
S. v. Robertson	166 N. C., 356	594
S. v. Rogers	173 N. C., 755	547
S. v. Ross	76 N. C., 242	229
S. v. Shaft	166 N. C., 407	515
S. v. Shemwell	180 N. C., 718	613
S. v. Smallwood	78 N. C., 560	529
S. v. Smith	103 N. C., 410	533
S. v. Smith	136 N. C., 684	560, 561
S. v. Smith	157 N. C., 578	548
S. v. Smith	164 N. C., 476	535, 599
S. v. Southerland	178 N. C., 676	526, 604
S. v. Speller	86 N. C., 697	575
S. v. Spivey	151 N. C., 678	620
S. v. Stancill	178 N. C., 683	298
S. v. Stitt	146 N. C., 643	539
S. v. Tankersley	172 N. C., 955	538
S. v. Taylor	118 N. C., 1262	533
S. v. Telfair	130 N. C., 645	534
S. v. Tenant	110 N. C., 609	388
S. v. Thomas	64 N. C., 74	617
S. v. Thornton	136 N. C., 616	546
S. v. Tom	13 N. C., 569	551
S. v. Toney	162 N. C., 635	599
S. v. Toole	106 N. C., 736	534
S. v. Traylor	121 N. C., 674	589
S. v. Turpin	77 N. C., 473	566
S. v. Utley	126 N. C., 997	538
S. v. Vann	162 N. C., 534, 539	593
S. v. Vaughan	91 N. C., 532	533
S. v. Ward	180 N. C., 693	613
S. v. Warren	113 N. C., 684	546
S. v. Wiggins	171 N. C., 814	518
S. v. Wilcox	131 N. C., 707	526
S. v. Wilkerson	164 N. C., 437	569
S. v. Winner	153 N. C., 602	587
S. v. Wolf	122 N. C., 1081	62
S. v. Womble	112 N. C., 862	583
S. v. Woodlief	172 N. C., 885	544
S. v. Yearwood	178 N. C., 813	518
S. v. Yellowday	152 N. C., 793	533
S. v. Younger	12 N. C., 357	551
Statesville, Clark v.	139 N. C., 490	149
Staton, Austin v.	126 N. C., 783	470, 471
Staton v. Mullis	92 N. C., 627	473
Staton v. R. R.	144 N. C., 145	38
Steamboat Co., Darden v.	107 N. C., 437	70
Steamboat Co. v. Trans. Co.	166 N. C., 582	128
Steele v. Grant	166 N. C., 635	399
Stell v. Barham	87 N. C., 62	84
Stern v. Benbow	151 N. C., 462	402
Stevens v. Smathers	123 N. C., 499	360

Stewart, Burns v. 162 N. C., 360 89
Stewart v. Lumber Co. 146 N. C., 47 116, 499
Stewart, Taylor v. 172 N. C., 203 217
Stewart, Taylor v. 175 N. C., 199 217
Stewart, Worth v. 122 N. C., 258 129
Stinson, Hairston v. 35 N. C., 479 17
Stitt, S. v. 146 N. C., 643 539
Stone v. R. R. 144 N. C., 220 534
Stone v. Texas Co. 180 N. C., 546 399
Strickland, Allen v. 100 N. C., 225 273
Strother v. R. R. 123 N. C., 197, 199 115, 116, 430
Sudderth, Hood v. 111 N. C., 215 417
Summerlin v. R. R. 133 N. C., 550 295
Summers, Mfg. Co. v. 143 N. C., 102 186
Suttle v. Doggett 87 N. C., 203 366
Sweaney, Clark v. 175 N. C., 280 216
Sweaney, Clark v. 176 N. C., 529 216
Swift & Co. v. Tempelos 178 N. C., 487 186, 187

T

Tankard v. Tankard 79 N. C., 54 90
Tankersley, S. v. 172 N. C., 955 538
Tarry, Bowser v. 156 N. C., 38 209
Tate v. Comrs. 122 N. C., 661 248
Tate v. R. R. 168 N. C., 523 142
Tax Commission, Bickett v. 177 N. C., 433 178
Taylor, Brown v. 173 N. C., 700 391
Taylor, Brown v. 174 N. C., 423 8
Taylor v. Security Co. 145 N. C., 385 299
Taylor, S. v. 118 N. C., 1262 533
Taylor v. Stewart 172 N. C., 203 217
Taylor v. Stewart 175 N. C., 199 217
Teeter, Wallace v. 138 N. C., 264 379
Tel. Co., Carmichael v. 157 N. C., 21 104
Tel. Co., Godwin v. 136 N. C., 258 177
Tel. Co., Jackson v. 139 N. C., 347 112, 194
Tel. Co., Morton v. 130 N. C., 299 205
Tel. Co., Walser v. 114 N. C., 440 374
Telfair, S. v. 130 N. C., 645 534
Tempelos, Swift & Co. v. 178 N. C., 487 186, 187
Tenant, S. v. 110 N. C., 609 388
Texas Co., Fox v. 180 N. C., 543 399
Texas Co., Newton v. 180 N. C., 561 399
Texas Co., Stone v. 180 N. C., 546 399
Thaxton, Bitting v. 72 N. C., 541 254
Thigpen v. Cotton Mills 151 N. C., 97 205
Thomas v. R. R. 173 N. C., 494 114
Thomas, Raisin v. 88 N. C., 148 259
Thomas, Skinner v. 171 N. C., 98 642, 643
Thomas, S. v. 64 N. C., 74 617
Thomas, Williams v. 78 N. C., 47 527
Thompson v. Batts 168 N. C., 335 409
Thompson v. Express Co. 180 N. C., 42 316
Thompson v. Humphrey 179 N. C., 52 56

Thompson v. Lumber Co. 168 N. C., 226 15, 16
Thompson, Lutz v. 87 N. C., 334 247
Thompson v. Notion Co. 160 N. C., 519 273
Thompson v. Smith 156 N. C., 345 509
Thorne, Mills v. 95 N. C., 362 162
Thornton, S. v. 136 N. C., 616 546
Threadgill v. Ingram 23 N. C., 577 452
Tillery, Guano Co. v. 110 N. C., 29 252
Tillett v. R. R. 115 N. C., 665 114
Tillett v. R. R. 166 N. C., 520 411
Tire Co. v. Whitehurst 148 N. C., 446 298
Tise v. Whitaker 144 N. C., 508 179
Tobacco Co., Machine Co. v. 141 N. C., 284, 289, 290 373, 375
Todd v. Outlaw 79 N. C., 235 311
Toler, Caton v. 160 N. C., 104 298
Tom, S. v. 13 N. C., 569 551
Tomlinson v. Morgan 166 N. C., 557 280
Tompkins v. Cotton Mills 130 N. C., 350 374
Toney, S. v. 162 N. C., 635 599
Toole, S. v. 106 N. C., 736 534
Totten, Norwood v. 166 N. C., 648 89, 470
Traction Co., Clark v. 138 N. C., 77 224, 225
Traction Co., Morarity v. 154 N. C., 586 498
Trans. Co., Mann v. 176 N. C., 107 302
Trans. Co., Steamboat Co. v. 166 N. C., 582 128
Traylor, S. v. 121 N. C., 674 589
Triplett v. Williams 149 N. C., 394 81, 471
Trollinger v. Fleer 157 N. C., 81, 87 221
Trunk Co., Jarrett v. 144 N. C., 299 62
Trust Co., Comrs. v. 164 N. C., 301 353
Trust Co., Donlan v. 139 N. C., 212 183
Trust Co. v. Ellen 163 N. C., 47 101
Trust Co., Fisher v. 138 N. C., 224 257
Trust Co., Kennedy v. 180 N. C., 225, 229 499
Trust Co., Martin Co. v. 178 N. C., 26 422
Trust Co., Patterson v. 157 N. C., 13 93, 439
Trustees v. Webb 155 N. C., 383 351
Tucker, Hamlin v. 72 N. C., 503 287
Turner v. Livestock Co. 179 N. C., 457, 460 262, 605
Turpin, S. v. 77 N. C., 473 566
Turrentine, Adams v. 30 N. C., 149 149

U

University v. Gatling 81 N. C., 509 328
University, White v. 39 N. C., 19 334
Upton, Cohoon v. 174 N. C., 88 161
Utley v. R. R. 119 N. C., 720 471
Utley, S. v. 126 N. C., 997 538

V

Vanderbilt v. Johnson 141 N. C., 370 72
Vann, Kearney v. 154 N. C., 315 451
Vann, Midgett v. 158 N. C., 130 183
Vann v. R. R. 180 N. C., 659 101

Vann, S. v. 162 N. C., 534, 539 593
Vaughan, S. v. 91 N. C., 532 533
Vaught v. Williams 177 N. C., 82 72
Venters, Walker v. 148 N. C., 388 208
Vick, Simms v. 151 N. C., 78 129
Vickers v. Leigh 104 N. C., 248 81, 82, 84
Vincent v. Pace 178 N. C., 421 152

W

Walker, Armfield v. 27 N. C., 583 81, 84
Walker v. Venters 148 N. C., 388 208
Wall, Carpenter v. 20 N. C., 279 460
Wallace v. R. R. 174 N. C., 174 116
Wallace v. Teeter 138 N. C., 264 379
Walser v. Tel. Co. 114 N. C., 440 374
Ward, Harrison v. 58 N. C., 236 163
Ward v. Jones 40 N. C., 404 162
Ward, Smithwick v. 52 N. C., 64 153
Ward, S. v. 180 N. C., 693 613
Warren, S. v. 113 N. C., 684 546
Warren v. Williford 148 N. C., 474 16
Water Co., Griffin v. 122 N. C., 208 171
Watson v. Davis 52 N. C., 178, 181 527
Waxhaw, Cotton Mills v. 130 N. C., 293 388
Webb v. Chemical Co. 170 N. C., 662 425
Webb, Comrs. v. 160 N. C., 594 135
Webb, Peterson v. 39 N. C., 56 163, 164
Webb v. Rosemond 172 N. C., 848 360
Webb, Trustees v. 155 N. C., 383 351
Weeks v. Weeks 40 N. C., 117 346
Wellborn, Sprinkle v. 140 N. C., 163 89, 186
Wells, Bunn v. 94 N. C., 67 81
Wells v. R. R. 51 N. C., 47 382
West v. Grocery Co. 138 N. C., 166 298
Weston v. Lumber Co. 160 N. C., 263, 268 72, 311
Weston v. Lumber Co. 162 N. C., 165, 180 17, 408
Weston v. Lumber Co. 169 N. C., 398 17
Wheeler v. Construction Co. 170 N. C., 427 339
Whichard v. Craft 175 N. C., 128 55
Whichard, Jones v. 163 N. C., 241 161, 162, 163
Whitaker, Batchelor v. 88 N. C., 350 84
Whitaker, Francks v. 116 N. C., 518 346
Whitaker, Tise v. 144 N. C., 508 179
White, Gudger v. 141 N. C., 507 82
White v. R. R. 115 N. C., 631 115
White, Shelton v. 163 N. C., 90 12
White v. University 39 N. C., 19 334
Whitehurst v. Tire Co. 148 N. C., 446 298
Whitesides v. Cooper 115 N. C., 570 55, 56, 162
Whitfield v. Boyd 158 N. C., 453 78
Whitfield v. Garris 134 N. C., 24 54
Whitford v. Ins. Co. 163 N. C., 223 44
Whitlock v. Lumber Co. 145 N. C., 120 128
Whitmore v. Hyatt 175 N. C., 117 186

Wiggins v. Guthrie 101 N. C., 661, 678 245, 258, 261, 377
Wiggins, S. v. 171 N. C., 814 518
Wilcox, Navigation Co. v. 52 N. C., 481 128
Wilcox, S. v. 131 N. C., 707 526
Wilkerson, S. v. 164 N. C., 437 569
Wilkes, Osborne v. 108 N. C., 651 530
Wilkes v. Slaughter 10 N. C., 211 236
Wilkins, Anderson v. 142 N. C., 153 514
Wilkins, Smith v. 164 N. C., 136 389, 541
Wilkinson v. Dellinger 126 N. C., 462 415, 419
Willeford v. Bailey 132 N. C., 402 417
Williams v. Alexander 74 N. C., 1 233
Williams v. Biggs 176 N. C., 50 56
Williams, Calvert v. 64 N. C., 168 405
Williams, Electric Co. v. 123 N. C., 51, 54, 55 246, 258, 259, 261, 262
Williams, Frederick v. 103 N. C., 189 471
Williams v. Gill 122 N. C., 967 115, 116
Williams, Jacobs v. 173 N. C., 276 473
Williams v. McComb 38 N. C., 450 122
Williams, O'Kelly v. 84 N. C., 281 42
Williams, Pritchard v. 175 N. C., 319 47, 78
Williams, Pritchard v. 176 N. C., 108, 110 47, 77, 78
Williams, Pritchard v. 178 N. C., 444 47, 78
Williams v. R. R. 144 N. C., 498, 502 115, 116, 256
Williams v. R. R. 153 N. C., 360 39
Williams, Smithwick v. 30 N. C., 268 641
Williams v. Thomas 78 N. C., 47 527
Williams, Triplett v. 149 N. C., 394 81, 471
Williams, Vaught v. 177 N. C., 82 72
Williamson v. Jones 127 N. C., 178 366
Williford, Warren v. 148 N. C., 474 16
Willis v. Branch 94 N. C., 149 374
Wilmington v. Davis 63 N. C., 582 244
Wilmington, Hocutt v. 124 N. C., 214 39
Wilmington, McIlhenny v. 127 N. C., 146, 149 195, 385
Wilson, Bank v. 124 N. C., 569 251
Wilson, Bank v. 168 N. C., 557 119
Wilson, Cloud v. 72 N. C., 155 149
Wilson v. Featherston 122 N. C., 747, 750 93, 439
Wilson v. Hughes 94 N. C., 182, 187 251, 259, 265
Wilson v. Ins. Co. 155 N. C., 173 367
Wilson v. Jordan 124 N. C., 683 642
Wilson v. Pope 175 N. C., 490 216
Wilson v. R. R. 142 N. C., 340 499
Wilson v. R. R. 165 N. C., 499 231
Winborne v. Cooperage Co. 178 N. C., 88 506
Winborne v. Downing 105 N. C., 20 81
Winner, S. v. 153 N. C., 602 587
Winslow v. Hardwood Co. 147 N. C., 275 569
Wiseman, Shoe Store Co. v. 174 N. C., 716 244
Withers v. Lane 144 N. C., 184 547
Wittson v. Dowling 179 N. C., 542 339
Wolf, S. v. 122 N. C., 1081 62
Womble, S. v. 112 N. C., 862 583

Wood v. Public Service Corp. 174 N. C., 697 224
Wood, Snipes v. 179 N. C., 349 240
Woodall v. Comrs. 176 N. C., 377 455
Woodcock, Powell v. 149 N. C., 235 122
Woodlief, Petit v. 115 N. C., 125 433
Woodlief, S. v. 172 N. C., 885 544
Woodmen, Ange v. 173 N. C., 33 193
Woodworking Co. v. Southwick 119 N. C., 611 392
Wool, Edenton v. 65 N. C., 379 244
Wool v. Fleetwood 136 N. C., 460, 470, 471 162, 409
Wooten v. Drug Co. 169 N. C., 64 244
Wooten, Hancock 107 N. C., 9 256
Worth, Reiger v. 127 N. C., 230 374
Worth v. Stewart 122 N. C., 258 129
Worthy, Currie v. 47 N. C., 104 236
Wright, Harris v. 118 N. C., 422 128
Wyman, Cooper v. 122 N. C., 784 8

Y

Yearwood, S. v. 178 N. C., 813 518
Yellowday v. Perkinson 167 N. C., 147 246, 258, 259, 262
Yellowday, S. v. 152 N. C., 793 533
Yoder, Fulbright v. 113 N. C., 456 81, 84
Young v. Jackson 92 N. C., 144 70
Young v. R. R. 157 N. C., 78 411
Younger, S. v. 12 N. C., 357 551

Z

Zachary, McCall v. 131 N. C., 466 253
Zollicoffer v. Zollicoffer 168 N. C., 326 439

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1921

A. A. PAUL v. NATIONAL AUCTION COMPANY AND S. A. EURE AND W. T BURTON, TRADING AS BURTON BROTHERS.

(Filed 23 February, 1921.)

1. **Libel—Slander—Publication—Facts Constituting Slander.**

   To constitute a libel it is not necessary that the publication should impute the commission of a crime, infamous or otherwise, but the charge is sufficient when a false publication is made, holding one up to public hatred, obloquy, contempt or ridicule, etc.; and the charge may be sustained by a false publication reasonably calculated to injure one in his trade, business or profession, by imputing to him fraud, indirect dealing or want of capacity in reference to the same, without the averment of special damages.

2. **Same—Pleadings—Admissions—Demurrer—Matters of Defense—Trials—Questions for Jury.**

   By contract the two defendants agreed to sell at auction the lands of customers the plaintiff should procure, upon a division of the profits. Accordingly, and at the instance of one of the defendants, the plaintiff advertised, to procure customers, in a daily newspaper published and circulating in that locality, to which the other defendant published in the following issue of the paper, a denial of any such arrangement, or that he had any knowledge thereof, and "warned" the public that he would not be bound by any selling arrangements made by them with the plaintiff, etc., and this with full knowledge of the contract and against the protest of the plaintiff that it would do him serious damage in his business and prospects: *Held*, defendant's publication was libelous without averment of special damages.

3. **Libel—Notice—Damages—Statutes—Newspapers.**

   As to whether C. S., 2429, et seq., as to notice to defendant in an action for libel, looking to a retraction and apology, applies to individuals having no connection with a newspaper publishing the libel, *Query? Held*, the statutes having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation."

4. **Pleadings—Answers—Admissions—Instructions—Appeal and Error—Requests for Instructions.**

In an action for libel, where the defendant has filed no answer, an instruction of the trial judge that the plaintiff must satisfy the jury as to the amount of the damages, and that the allegations of the libelous matter must be taken as true against the defendant is not error (C. S., 543), and *Held* in this case; while the charge is somewhat general on the issue of damages, it will not be held for reversible error on the record, and the absence of defendant's prayer to make it more specific.

5. **Libel—Pleadings—Admissions—Issues—Waiver.**

Held, in this action to recover damages for slander, the defendant's failure to answer was not waived by the submission of an issue without objection as to whether the publication was wrongful and unlawful, and made after the plaintiff's request not to publish it, but it was for the jury to determine whether in addition to the admissions of a cause of action growing out of defendant's failure to answer, the tort so admitted was willful and without just cause or excuse.

APPEAL from *Cranmer, J.*, at May Term, 1920, of BEAUFORT.

The cause was before us at the preceding term, and a *certiorari* was ordered for a further statement of case on appeal. The writ having been complied with, it appears that plaintiff instituted this action returnable to October Term of the Superior Court of 1917, against the National Auction Company, S. A. Eure, its president, and W. T. Burton, trading as Burton Brothers. That personal service of summons was made on all of the defendants, and verified complaint duly filed against all of them, alleging in effect a breach of contract on part of all defendants to associate themselves with plaintiff as dealers in real estate, and a libelous publication against plaintiff concerning such association, and contract causing damages, etc. There were separate answers filed by the auction company and S. A. Eure, its president, in denial of the contract or breach thereof, etc. Defendant Burton made no answer, and entered no appearance in the cause until after verdict, when he appeared and moved to set same aside, and which motion was overruled by the court. On issues submitted, the jury rendered the following verdict:

"1. Did defendants auction company and Burton make and enter into a contract with plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was plaintiff ready, able, and willing to perform the same on his part? Answer: 'Yes.'

"3. Did said defendants wrongfully breach said contract, as alleged? Answer: 'Yes.'

"4. If so, what damage has plaintiff sustained by reason of the breach thereof? Answer: 'None.'

"5. Was the publication of the notice in the *Daily News* of 31 May, 1917, wrongful and unlawful on the part of the defendant Burton, and did plaintiff request said defendant, before its publication, not to publish same? Answer: 'Yes.'

"6. If so, what damages has plaintiff sustained by reason of the said publication by said W. T. Burton, trading as Burton Brothers? Answer: '$2,500.'"

Judgment on verdict for plaintiff. Defendant Burton excepted and appealed, assigning for error the denial of his motion to set aside the verdict, and refusal of his Honor to hold as to the alleged libel that no cause of action had been stated or proved. Other specified objections of the charge as given.

Ward & Grimes, Small, MacLean, Bragaw & Rodman, and J. D. Paul for plaintiff.

W. C. Rodman, W. A. Lucas, and Skinner & Whedbee for defendant.

HOKE, J. The allegations in the complaint, duly verified and unanswered by defendant Burton, are in effect that the publication, the basis of plaintiff's cause of action, was both false and malicious, and designed and intended to injure plaintiff in his business reputation, to his great damage, and the evidence offered in support of the charge tended to show that in 1917 plaintiff, a young man desiring to enter the real estate business in the town of Washington and vicinity, a new field, was advised that his efforts and business success would be greatly promoted if he would associate himself with persons of experience and established repute in that locality, and with that view plaintiff formed an association with defendants, by which the latter were to auction the properties secured by plaintiff to the best advantage, and they were to divide the profits, one-third each to plaintiff and the National Auction Company and W. T. Burton, trading as Burton Brothers. That acting on the suggestion of defendant S. A. Eure, president of the company, plaintiff forthwith posted several advertisements concerning the business, and also caused to be published in the *Washington Daily News,* in its issue of 30 May, 1917, a notice of his business and of his association with defendants as follows:

AN IMPORTANT NOTICE.

I have associated myself with the National Auction Company of Ayden, and the famous Burton Brothers of Wilson, recognized as the foremost auctioneers in the county.

If you have land to sell at auction, or in any other way, it will pay you to see me. We have the largest, oldest, and best equipped force in the South. We give sales that cause the crowds to flock from miles around. Baloon ascensions and other features are used for attractions.

Call at my office and investigate. Attractive advertising matter is here for your inspection.

WE DO THINGS

A. A. PAUL,
Real Estate and Insurance,
Washington, N. C.

That in the issue of said paper the following day defendant Burton caused to be published a notice signed by him in repudiation of plaintiff's advertisement in terms as follows:

TO THE PUBLIC

In yesterday's *Daily News* appeared an advertisement by A. A. Paul, stating that he had associated himself with the National Auction Company, and the famous Burton Brothers of Wilson, for the sale of auction contracts in this community. We have no authority to speak for the National Auction Company of Ayden, but wish to announce that there is absolutely no contract or connection between Mr. Paul and the Burton Brothers, nor has there ever been. Furthermore, Mr. Paul has had no conference whatever with the Burton Brothers about such an association as he announced by advertisement yesterday. We wish to warn the public that we have no connection whatever with Mr. Paul, nor has he to our knowledge visited our office at Wilson. We wish to inform the public that in dealing with Mr. Paul it is not dealing in any way with us, and we will in no way be responsible for any contract made with him, nor bound in any way by any such contract.

BURTON BROTHERS,
Of Wilson, N. C.

The defendant having learned of defendant Burton's purpose to make this publication, and before same appeared, sought an interview with said defendant, fully informed him of the contract existent between them, and endeavored to dissuade him, urging that the effect could only work serious harm to plaintiff's prospects and business, but notwithstanding plaintiff's protest and remonstrance, defendant persisted in his purpose; and that said notice so published as heretofore stated was false and malicious, designed and intended to injure plaintiff in his character and business.

It is fully recognized that in order to constitute a libel it is not necessary that the publication should impute the commission of crime, infamous or otherwise, but the charge is established when a false publication is made, holding one up to public hatred, obloquy, contempt, or ridicule; and further, and without averment of special damages, such a charge may be sustained by a false publication calculated to injure one in his trade, business, or profession by imputing to him "fraud, indirect dealing, or incapacity" in reference to the same. The publication complained of in this instance begins by specially referring to plaintiff's advertisement of the day before, expressly repudiates plaintiff's claim to be associated with defendant, and in terms and under circumstances well calculated to degrade plaintiff in the estimation of the community, and to greatly weaken or destroy its confidence in his business integrity, and this after plaintiff had fully informed said defendant of the existence of the contract, and the circumstances attendant upon its execution, and protested against the publication and the harm it was likely to do him in his character and his calling, and under the principles stated, and numerous decisions here and elsewhere approving the same, such a publication so made in our opinion is clearly libelous, subjecting defendant to an action, and without averment of special damages. *Carter v. King,* 174 N. C., 549; *Jones v. Brinkley,* 174 N. C., 23; *Simmons v. Morse,* 51 N. C., 6; *Triggs v. Sun Printing Co.,* 179 N. Y., 144; *Riggs v. Dennison,* 3d Johnson, p. 198; *Manes v. Whiting,* 87 Michigan, 172; *Burt v. Advertiser, Etc., Co.,* 154 Mass., 238; *Lansing v. Carpenter,* 9 Wisconsin, 281; *Barron v. Smith,* 19 South Dakota, 50; *Sheibley v. Huse,* 75 Neb., 811; *Trebby v. Transcript Publishing Co.,* 74 Minn., 84; 19 American & English Encyclopedia (2 ed.), pp. 909-942; 17 R. C. L., pp. 263-294; Title, Libel and Slander, secs. 3-34.

It is further insisted in support of appellant's principal objection that there is no allegation of notice being served on defendant, looking to a retraction and apology pursuant to provisions of Consolidated Statutes, ch. 48, sec. 2429, *et seq.* In cases on these sections which have come under our observations, the suits were against the proprietors or publishers and editors of the newspapers and periodicals, but conceding that the language of this legislation is broad enough to include, and is intended to and does include a publication of the kind printed here, a publication by an individual having no business or other connection with the paper, etc., and this seems to be the clear meaning and purport of the law, the position cannot avail the appellant on the facts of this record. In the well considered case of *Osborn v. Leach,* 135 N. C., 628, the Court has held that these statutory provisions only have significance on the question of awarding punitive damages; that an action for libel may proceed for recovery of compensatory damages, whether the notice has been given or otherwise, the same case holding that such damages may be properly held to include compensation for "pecuniary loss, physical pain, mental suffering, and injury to reputation." In the case before us, not only has there been no formal demurrer pointing out the defect suggested, the proper way under our decisions to present the objection, but a perusal of the record and the charge of the court on the subject fails to show that the element of punitive damages was in any way considered or passed upon by the jury, but on the contrary, gives clear indication that only compensatory damages have been awarded. There has no harm come to defendant, therefore, by the failure to allege or prove the statutory notice, and this exception also must be disallowed.

It was further objected that his Honor in charging the jury on the sixth issue, that as to damages, said, among other things: "The burden of this issue is upon the plaintiff; he must satisfy you of the amount of his damage. Burton makes no defense to this action. The allegations as to Burton are not denied, and are therefore to be taken as true as to him. You will write your answer to this issue some sum not exceeding $5,000. The plaintiff asks for $5,000, and you could not allow him more than that amount; do not take this as an intimation that you are to allow him that. You will consider and weigh with care the evidence on this point, and allow such fair and reasonable sum as you may find the plaintiff entitled to."

While this charge is somewhat general as to amount of damages to be awarded, on consideration of the entire record, we do not think it should be held for reversible error on that account in the absence of any prayer to make the same more specific, and as to the objection here chiefly urged that the statement of the cause of action not having been denied by the defendant Burton, must be taken to be true as to him, the charge seems to be fully justified by the statute directly bearing on the subject. Consolidated Statutes, sec. 543, to the effect that "every material allegation of the complaint not controverted by the answer shall be taken as true." Nor is the effect of this provision of defendant's failure to answer prevented or waived by the submission of the fifth issue as to whether the publication of that issue was "wrongful and unlawful on the part of defendant Burton, and after request by plaintiff not to publish same." That issue was no doubt submitted by reason of certain decisions of this Court to the effect that on recovery for a tort, founded on negligence, merely arrest and imprisonment on final process would not be justified, the cases holding further that to justify such imprisonment there must be a finding by the jury that the tort was "willfully committed." *McKinney v. Patterson*, 174 N. C., 483; *Oakly v. Lasater*, 172 N. C., 96, a general principle fully approved and justified in a former case of *Ledford v. Emerson*, 143 N. C., 527, wherein it was held that where fraud was charged in proceedings ancillary to the principal action, for an accounting, arrest and imprisonment by final process could not be had unless the issue of fraud was passed upon on an issue submitted to the jury. Whether the principle adverted to and involved in these decisions is permitted or required on a tort like the present is not now before us, but the issue we are considering was evidently submitted, not in waiver of defendant's failure to answer or of any rights accruing to plaintiff by reason of it, but with a view of having it determined by the jury whether, in addition to the admission of a cause of action growing out of defendant's failure to answer, the tort so admitted was willful and without just cause or excuse.

On full consideration, we are of opinion that the exceptions of appellant as now presented in the record disclose no reversible error, and the judgment on the verdict is affirmed.

No error.

L. L. WINDER v. NICHOLAS D. PENNIMAN

(Filed 23 February, 1921.)

Courts—Jurisdiction—Process—Nonresidents—Witnesses—Attachment—Replevy Bond.

A nonresident who comes into this State for the sole purpose of prosecuting his action in our courts and acting as a witness in his own behalf, is not subject to civil process, allowing him a reasonable time for coming and going, nor does he voluntarily submit to the jurisdiction of our courts by merely giving a replevy bond in proceedings for his personal baggage which was attached while he was here on that business.

APPEAL by defendant from *Allen, J.*, at January Term, 1921, of PASQUOTANK.

The defendant was a resident of Maryland, and came to Elizabeth City on 11 February, 1920, to prosecute an action brought by him against Winder, and also as witness in said case, and it is found as a fact that he came for no other purpose; that a few minutes after the case against Winder was determined, on said 11 February, 1920, the plaintiff in this action (the defendant in that) had a warrant of attachment served upon the property of plaintiff, which was found by the court to consist of a suit-case and hand-bag containing his wearing apparel, a ledger, an order book, and sales book, which he had brought for use as evidence in the trial of said case against Winder. This attachment was served by the sheriff on the night of 11 February, about 10 o'clock, the plaintiff intending to take an early train at 6:30 the next morning for Norfolk, his most direct route home; he had arrived in Elizabeth City on the day before for the sole purpose of said trial, which was completed on that day, and intended to leave on the next morning. After the attachment was served on his personal baggage, the defendant filed a replevin bond for return of the attached property, but not for the discharge of the attachment, and made no motion to set it aside.

Thereafter, 13 February, the defendant appeared specially by counsel, who moved to strike out the return of the sheriff, to set aside the attachment, and discharge the property seized thereunder, and to dismiss the action. This motion was refused, and on appeal to the judge the judgment of the clerk was affirmed, and the defendant's motion denied. Appeal by defendant.

Meekins & McMullan and Thompson & Wilson for plaintiff.
Aydlett & Simpson for defendant.

CLARK, C. J. "A summons under civil process cannot be served upon nonresidents who come into this State for the sole purpose of attending to litigation, either as suitor or witness. Such rule is based upon high considerations of public policy and not upon statutory law, since it is to the best interests of the public that suitors and witnesses from other states, who cannot be compelled to attend court here, may not be deterred from voluntarily appearing. The exemption of nonresident suitors or witnesses from service of civil process while attending courts in this State covers the time of their coming, their stay, and a reasonable time for returning." *Cooper v. Wyman,* 122 N. C., 784, where the subject is fully discussed; also *Brown v. Taylor,* 174 N. C., 423.

It is admitted that the defendant, a nonresident, was protected from service while in the State to attend the trial of his action, and for a reasonable time before and after the trial, and that he was preparing to leave immediately after the termination of his cause. But it is contended that he waived his exemption by giving a bond for the release of his property, and for this the plaintiff relies upon *Mitchell v. Lumber Co.,* 169 N. C., 397. We think this case differs from that. In the *Mitchell case* the defendant had property in this State which was not exempt from attachment, and which the defendant had a right to attach, whether the defendant was in the State or not. Therefore, when the defendant came in, gave bond, and secured the release of his property, which was rightfully attached, he submitted himself to the jurisdiction of the court, but here the undertaking was only a replevin bond, and did not ask the release of the attachment as to any other property of the defendant which might be found in this State, and does not bind the principal and his surety to pay any judgment which may be recovered in the action. It is merely an engagement to redeliver the attached property, or pay the value thereof, to the sheriff to whom execution upon any judgment obtained by the plaintiff might be issued and the order authorized the sheriff to surrender the possession of this property to the defendant, but did not dissolve the attachment nor withdraw the property from the lien thereon.

Clearly, therefore, it has not the same effect as a bail bond or an undertaking for the discharge of the attachment. It does not release the lien of the attachment, nor stand in the place of the attached property, and hence the giving of such an undertaking is not an acknowledgment of the jurisdiction of the court, or the validity of the attachment. This view is clearly discussed and stated in *Winter v. Packing Co.,* 51 Oregon, 97; 4 Corpus Juris, 1331, and other cases in the notes thereto.

The law to this purport is clearly stated and ably discussed in *Larned v. Griffin,* 12 Fed., 590, which has been cited with approval in *S. c.,* 28 Fed., 302, 652; 68 do., 441; 73 do., 740; 177 do., 547; 201 do., 1018; 30 Abb. (N. C.), 63; 3 Alaska, 303; 5 do., 88; 61 Ark., 508; 3 Boyce (Del.), 34; *S. c.,* 51 L. R. A. (N. S.), 1132; 6 do., 273; 46 D. C. App., 228; 83 Ga., 291; 21 Ill. App., 112; 51 Kans., 222; 73 Mich., 546; 125 do., 290; *S. c.,* 52 L. R. A., 192; 37 Minn., 468; 111 Mo., 441; 35 Mo. App., 303; 21 Nebraska, 458; 68 N. H., 314; 74 do., 506; 71 do., 214, 215; 136 N. Y., 589; *S. c.,* 20 L. R. A., 46; 46 Okla., 633; *S. c.,* L. R. A., 1916, E. 1172; 17 R. I., 716; *S. c.,* 19 L. R. A., 562; 35 do., 68; 120 Tenn., 343; 87 Wis., 292; 101 do., 432.

The defendant in the principal case cited, as in this, was attending court trial, and was there for no other purpose. He was sued and arrested in a civil suit, gave bond, and was released, and the Court held that giving the bond was not a submission to the jurisdiction of the court.

This case also differs from *Mills v. R. R.,* 119 N. C., 693, where a nonresident defendant came in and entered a general appearance and filed an answer to the merits, which was clearly a submission to the jurisdiction. In this case the defendant denied the right of the plaintiff to serve civil process upon him, and although he gave a replevin bond for the release of his personal effects illegally attached, he entered a special appearance before pleading to the action, and moved to dismiss because he was entitled to the privilege of exemption.

In *Hilton v. Can Co.,* 103 Va., 255, the Court says: "It would be a strange construction to hold that a bond given by a debtor to release property from the operation of an attachment should have the effect of subjecting him to a personal judgment. Every nonresident debtor, if this were so, would be in the dilemma of waiving the right to release the attached property by executing a bond, which would thus subject him to a personal judgment. The property levied on might (as in this case) be of small value as compared to the amount in controversy, but if the principle contended for be true, the penalty of its release by the execution of a bond would be a submission to the jurisdiction of the court." This will appear most strikingly if instead of an attachment of his personal effects, the person of the defendant had been arrested, and he had given bond for his release that he might return home, or to avoid remaining in jail, until a motion for his release could have been made and argued by counsel.

In 2 R. C. L., p. 875, it is held that, in a majority of the states, by an appearance and pleading to the merits a defendant will be estopped from moving to quash the writ, but he would not be estopped by merely giving bond to release the attached property.

In notes to *Butcher v. Leather Co.,* 12 Anno. Cas., 170, is set out a diversity of decisions as to the effect of giving a statutory bond to dissolve an attachment. In the following states it is held that giving such bond does not bar a motion to quash, *i. e.,* Arkansas, California, Georgia, Idaho, Indiana, Louisiana, New York, Ohio, and South Carolina. In some states the giving of a bond is held to release the attachment, and a motion to quash is unnecessary, and in others it is held that a bond is a waiver of a motion to quash, but an examination of these latter cases will show that the statutory bond, unlike the bond in this case, was to pay any judgment that might be obtained. Here the bond is, as already stated, merely a replevin bond to secure the release of the personal effects of the defendant, and is in no wise an acknowledgment of the validity of the attachment, and therefore is not a submission to the jurisdiction of the court, which does not follow except when the attachment of property is valid, and such appearance renders the defendant liable to a personal judgment.

If the defendant was exempt, as is unquestioned, from the service of summons, then his books, which were brought to be used as evidence in the case, and his necessary personal effects, such as clothing and the like, were exempt from attachment, because it was necessary for him to have them in attending the trial.

If this were not so, then the privilege would be nugatory. It could not be expected that the defendant would come from his home in Maryland to attend a trial in Elizabeth City without the necessary underclothing and toilet articles for his use. If not entitled to this, then, in the language used by a member of Congress, as set out in the Congressional Record, which therefore must be of sufficient dignity to be used here, a witness or a suitor from another State would be forced to come in light marching order, for as said in the above speech, he would be

> "Like the poor benighted Hindoo,
> Who does the best he kin do,
> And for clothes he makes his skin do."

We do not expect to reduce the exemption privilege of parties attending courts in this State from abroad to this limitation.

An appeal from a refusal to dismiss an action is not appealable, but "our decisions are to the effect that the refusal to dismiss a warrant of attachment is an appealable order, and unless appealed from, the questions involved become *res judicata.*" *Hoke, J.,* in *Mitchell v. Lumber Co.,* 169 N. C., 397, citing *Judd v. Mining Co.,* 120 N. C., 397, and other cases.

Defendant was entitled to have the attachment and the action based thereon dismissed.

Reversed.

PATIENCE ARMSTRONG ET AL. v. W. A. BEAMAN ET AL.

(Filed 23 February, 1921.)

Drainage District—Petitioners—Withdrawal of Names—Statutes.

Upon the return day set by the clerk of the court for the hearing of the landowners in a proposed drainage district, C. S., 5284, etc., it may be shown by those opposed to the petition that some of those who signed it desired to withdraw, and that eliminating their names the petitioners would not represent a majority of the landowners in the district, or such owning three-fourths of the lands, as the statute requires.

APPEAL from *Calvert, J.,* at November Term, 1920, of PASQUOTANK.

This is an appeal from an order on a petition for the establishment of a drainage district. The petition having been filed on the hearing before the clerk, the petition was offered in evidence, together with other testimony on the part of the petitioners tending to show that said petition had been signed by a majority of the resident landowners in the proposed district, and by the owners of three-fifths of all the land affected or to be assessed for the expense of the proposed improvements.

The defendants or cross-petitioners then stated that they were ready to offer testimony tending to show that many of those who originally signed the petition desired to withdraw, and that eliminating those desiring to withdraw there would not be sufficient signatures left on the petition to constitute a majority of the landowners, or to represent three-fifths of the acreage. The clerk stated that he would hear such testimony, but that he would hold that the allegations of the cross-petitioners, if proven, would not justify an order by him allowing said cross-petitioners to withdraw, and furthermore, would constitute no legal obstacle to the appointment of an engineer and viewers, as contemplated by the drainage act.

Whereupon the clerk entered judgment as appears of record; it being agreed that the names of the engineer and viewers be left blank in said order, and filled in by the clerk at his convenience after due inquiry as to the fitness of the proposed engineer and viewers.

Upon the defendants' or cross-petitioners' appeal from this order of the clerk, his Honor, T. H. Calvert, entered an order remanding the cause to the clerk with directions to dismiss the petition if the cross-petitioners should establish their contention that eliminating those desiring to withdraw, sufficient signatures would not be left on the petition to show a compliance with the provisions of the drainage act. To this order the petitioners excepted and appealed to the Supreme Court.

W. L. Cohoon and Meekins & McMullan for plaintiff.
Ehringhaus & Small and Aydlett & Simpson for defendants.

ALLEN, J. The initial step in the establishment of a drainage district under chapter 442 of the Laws of 1909, now sec. 5284, *et seq.*, of the Consolidated Statutes, is the filing of a petition by a "majority of the landowners or the persons owning three-fifths of all the lands" in the proposed district, and upon this preliminary requirement being performed, it is made the duty of the clerk of the Superior Court to issue notice to all other landowners in the district, not parties to the petition, to appear on a day certain when the petition is heard. These provisions were followed by the petitioners, but on the return day those opposed to the establishment of the district offered to show that some of those who signed the petition wished to withdraw therefrom, and that if their names were not considered the petitioners would not represent a majority of the landowners or of persons owning three-fifths of the lands.

The clerk held, in substance, that the petitioners could not withdraw, and that if the fact was established as contended for by the defendants, it would not justify a dismissal of the proceeding.

The defendants appealed from this ruling, which was reversed, and the judge directed that the cause be remanded to the clerk to the end that he might hear the evidence, and directed him to dismiss the proceeding if found that the requisite number of landowners or persons owning land were not in favor of the establishment of the drainage district, and from this order the plaintiffs appealed.

The question is decided against the petitioners in the case of *Shelton v. White*, 163 N. C., 90, in which, upon the coming in of the final report, it was alleged by certain parties objecting to the establishment of the drainage district that a majority of the resident landowners and the owner of three-fifths of the lands objected to the formation of the district; and it was held: "If the fact is as alleged, the proceeding should be dismissed, notwithstanding that some of the objectors signed the original petition, for upon the coming in of the final report they may ascertain that the facts are different both as to cost and benefit from what was understood when they signed the petition."

Surely if persons who have signed the petition may object to the formation of the district after the proceeding has gone through various steps, and expenses have been incurred, even up to the final report, they ought to be permitted to do so in the preliminary stages and before any order has been made, and that is the condition here.

It is said in Central Drainage District, 134 Wis., 130: "The signer of a petition to establish a drainage ditch has an absolute right to withdraw before the approval of the petition as warranting the appointment of commissioners, and, therefore, till final action upon the commissioners' report, he has a qualified right to withdraw analogous to that of a complaint, in a civil action in equity to dismiss his bill."

See, also, *Mack v. Polecat Drainage District,* 216 Ill., 56; *Stockard v. Veal,* 35 L. R. A. (N. S.), 115.

The order of the judge must be

Affirmed.

RICHMOND CEDAR WORKS v. T. H. SHEPARD ET AL.

(Filed 23 February, 1921.)

1. **Deeds and Conveyances — Delivery — Payment of Purchase Price — Equity—Estates—Evidence.**

Where a grantee in a deed necessary to establish plaintiff's chain of title has died before delivery of the deed, it is necessary for his heirs at law to successfully claim an equitable estate in the lands covered by the deed, to establish payment by their ancestor by sufficient evidence, and in the absence of a finding thereon, it cannot be so declared as a matter of law.

2. **Deeds and Conveyances—Tax Deeds—Affidavits—Presumptions—Statutes.**

Under the provisions of ch. 137, sec. 70, Public Laws of 1887, it is required that a purchaser at the sheriff's sale of land for taxes show, by affidavit, a compliance with the provisions of the statute, and present it to the one authorized by law to execute the tax deed, and by such officer delivered to the register of deeds for entry of record, which must be by evidence outside the deed, and there being no presumption under section 74 of said chapter that this has been done, in the absence of such proof, the purchaser acquires no title.

3. **Same.**

Sections 60, 70, and 71 of the acts of 1887, relating specifically to matters and things required to be done by the purchaser at a tax sale, to perfect his title to the lands, are omitted by the act of 1889, while sec. 74 of the former act, relating to presumptions, is expressly brought forward with practically no modifications, and hence a tax deed made under the provisions of the act of 1889 is valid without proof of the affidavit, etc., required by the act of 1887.

4. **Deeds and Conveyances—Tax Deeds—County.**

A sheriff's deed to land sold for the nonpayment of taxes lying within his own and an adjoining county is valid only as to so much of the land as lies within his own county, and of no effect beyond its boundary.

5. **Deeds and Conveyances—State Board of Education—State's Lands—Grants.**

Where the plaintiff claims lands under a deed from the State Board of Education executed in 1904, and *mesne* conveyances, and it appears that the State had granted it to others in 1784 and 1792, his title will fail, for the deed from the State Board of Education has no legal effect when State grants covering the same lands are shown to have been issued prior to 1825. *Weston v. Lumber Co.*, 162 N. C., 165, cited as controlling.

APPEAL from *Calvert, J.*, at November Term, 1920, of PASQUOTANK.

This action was brought under sec. 1589 of the Revisal, now sec. 1743, Consolidated Statutes, and involves the ownership of three tracts of land situate in the counties of Pasquotank, Perquimans, and Gates. The case is submitted on facts agreed, from which it appears plaintiff claims title under three independent sources, as follows:

1. The first originates with four grants, issued 27 October, 1784, to Jonathan Herring, and with which plaintiff seeks to connect itself by *mesne* conveyances.

Under this claim, two deeds, necessary links in plaintiff's chain of title, are attacked by the defendants as invalid: one a deed of date 6 September, 1853, from Ehringhaus, clerk and master, to Joseph Pritchard, purporting to have been executed under the authority of a decree in a special proceeding to sell said lands for partition, instituted by William B. Shepard, and the heirs of Ann Pettigrew at Spring Term, 1850, of Pasquotank County Court of Equity; the other a certain paper-writing, dated 6 March, 1854, purporting to be a deed from James Taylor, administrator of Joseph Pritchard, to Matchett Taylor.

It is admitted that Joseph Pritchard died prior to the date of execution of the clerk and master's deed, but plaintiff contends that if said deed be void for this reason, the heirs of Joseph Pritchard would be vested with an equitable estate upon proof of payment of the purchase price bid at the sale. To establish such payment, which is not admitted, plaintiff relies upon the record, evidence tending to show that the lands were ordered to be sold for $1,200 on credit, but the acknowledgment recited in said deed is "four hundred dollars to me in hand secured to be paid at the time of the said sale by him the said Joseph Pritchard."

2. Plaintiff's second claim is founded upon four tax deeds, purporting to have been executed by the sheriffs of Pasquotank County for unpaid taxes due upon said lands for the years 1887, 1888, and 1889. These deeds are attacked by the defendants; and, there being no evidence *ultra* on the record, their validity must be determined by the presumptions of their recitals as construed under the acts regulating the sale of lands for nonpayment of taxes for said years.

It is admitted that the records of Pasquotank County fail to disclose any affidavit from the purchaser, or any one on its behalf, made at the time of, or prior to, the execution of the paper-writings purporting to be deeds from the sheriff of Pasquotank County to the John L. Roper Lumber Company, purchaser at the tax sale, and plaintiff's grantor.

3. The plaintiff's third source is derived from an alleged deed of date 24 October, 1904, executed by the State Board of Education of North Carolina to George W. Roper, but it is admitted that on 27 December, 1792, a grant for the lands in controversy was issued to John Hamilton, whose title, by *mesne* conveyances, passed to William Shepard.

It is stipulated that if upon the facts agreed the court is of opinion, as a matter of law, the plaintiff is the owner of the lands in controversy, or any part thereof, and has the right to maintain this action, then judgment shall be entered accordingly, declaring the plaintiff to be the owner and entitled to the possession of said lands, or part thereof; otherwise, judgment to be entered declaring the defendants, T. H. Shepard, Mrs. William Graham, and Mrs. Louise McConnell, the owners and entitled to the possession of said lands, or such part thereof as plaintiff may fail to recover.

His Honor, being of opinion that plaintiff's only valid source of title was derived from the tax deeds, entered judgment in its favor for that portion of the lands in controversy lying wholly within the boundaries of Pasquotank County, and adjudged the defendants to be the owners of that portion of said lands lying outside the limits of said county.

Plaintiff and defendants excepted, and appealed.

Thompson & Wilson for plaintiff.
Meekins & McMullan for defendants.

STACY, J. The validity of the plaintiff's first claim of title was before this Court in the case of *Thompson v. Lumber Co.*, 168 N. C., 226. It was there decided that the clerk and master's deed to Joseph Pritchard was void for want of delivery, the grantee being dead at the time of its execution, but it was suggested that upon proof of payment of the purchase price, bid at the sale, an equitable estate would inure to the heirs of the purchaser. There are some circumstances tending to show payment, but the evidence is not conclusive, and the fact is not admitted. In the absence of such finding, or sufficient evidence to establish payment, it cannot be said, as a matter of law, to have been made. Hence, no equitable estate has been established as vesting in the heirs of the purchaser.

The plaintiff having failed to show any legal title in Joseph Pritchard, or equitable estate in his heirs, it becomes unnecessary to consider again the alleged deed from James Taylor, administrator of Joseph Pritchard, to Matchett Taylor. *Thompson v. Lumber Co., supra.*

Plaintiff's second claim of title is based upon four tax deeds purporting to have been executed by the sheriffs of Pasquotank County for taxes due on said lands and unpaid for the years 1887, 1888, and 1889. These deeds contain the usual recitals—three of them having been executed under authority of the Laws of 1887 for taxes presumably due and unpaid for the years 1887 and 1888; and said deeds purport to convey two tracts of 140 acres and 1,700 acres, respectively. The fourth tax deed was executed under authority of the Laws of 1889 for taxes presumably due and unpaid for said year, and the same purports to convey 399 acres situate partly in the county of Pasquotank and partly in Perquimans County.

The power to sell real estate for delinquent taxes and the authority of the sheriff or tax collector to issue a tax deed to the purchaser is a matter of statutory right, and can be exercised only in conformity with the law under which it is given. 37 Cyc., 1280.

By reference to chapter 137, Public Laws of 1887, it will be seen (sec. 70) that before any purchaser at a sale of land for taxes acquired the right to call for a deed, it was necessary for him to make an affidavit, showing his compliance with the requirements of the statute, and present same to the person authorized by law to execute such tax deed; and, by such officer, it was to be delivered to the register of deeds for entry on the records of his office and for safe-keeping. Section 74 of said chapter provides that the sheriff's deed shall be presumptive evidence as to some of the things required to be done, and conclusive evidence as to some of the others. But there is no presumpiion that the purchaser executed and presented the necessary affidavit. This must be established by evidence outside of the deed; and in the absence of such proof, the purchaser acquires no title. *King v. Cooper,* 128 N. C., 347; *Matthews v. Fry,* 141 N. C., 582; *Warren v. Williford,* 148 N. C., 474; *Rexford v. Phillips,* 159 N. C., 213.

It is admitted that the records of Pasquotank County fail to disclose any affidavit from the purchaser, or any one on its behalf, made at the time of or prior to the execution of the tax deeds; and there is no other evidence tending to show its alleged loss or destruction, or that it ever existed. Thus failing to prove the making and presentation of the requisite affidavit, the plaintiff can derive no benefit from the three tax deeds purporting to have been executed under authority of the Laws of 1887, for taxes assessed and unpaid for the years 1887 and 1888.

But with respect to the fourth tax deed, executed under authority of chapter 218, Public Laws of 1889, for delinquent taxes due for said year, we conceive the law to be somewhat different. Sections 69, 70, and 71 of the act of 1887, relating specifically to matters and things required of the purchaser at the tax sale, are omitted from the act of 1889; while section 74, touching the matter of presumptions, is expressly brought forward with practically no modification. *Saunders v. Earp,* 118 N. C., 275; *King v. Cooper,* 128 N. C., 347.

Therefore, under this latter act, by reason of the changed requirements and virtually unchanged presumptions, and from the facts agreed, it would appear that the plaintiff's deed is valid as to that portion of the 399-acre tract lying wholly within the boundaries of Pasquotank County. The sheriff, however, was without authority to sell the lands situate beyond the limits of his own county (37 Cyc., 129; 26 R. C. L., 269), and as to that portion of the 399-acre tract lying in Perquimans County plaintiff's tax deed is without effect. The case of *Hairston v. Stinson,* 35 N. C., 479, is not in conflict with this position, because the provisions of the statute under which that case was decided are materially different from the law of 1889.

The plaintiff's third claim, made for the purpose of showing an independent source of title, is derived from an alleged deed of date 24 October, 1904, executed by the State Board of Education to George W. Roper, whose title, if any, under said deed, by *mesne* conveyances, has now passed to the plaintiff. It appears, however, from the case agreed that in 1784 the lands in controversy were granted to Jonathan Herring, and again in 1792 another grant, covering the same lands, was issued to John Hamilton. A similar state of facts was before the Court in the case of *Weston v. Lumber Co.,* 169 N. C., 398, where it is held that a deed of the State Board of Education has no legal effect when grants, covering the *locus in quo,* are shown to have been issued by the State prior to 1825. Hence, plaintiff's claim from this source is without avail. A full and clear discussion of the effect and validity of deeds executed by the State Board of Education will be found in *Weston's case* as reported on the first appeal, in *Weston v. Lumber Co.,* 162 N. C., 165.

From the foregoing it follows that the judgment of the Superior Court must be modified so as to give the plaintiff only that portion of the 399-acre tract lying wholly within the boundaries of Pasquotank County, and covered by the deed executed by the sheriff for the nonpayment of taxes for the year 1889; and award the remainder of said lands in controversy to the defendants as their respective interests, *inter se,* may be made to appear, conformably with the agreement filed in the cause. Let judgment be entered accordingly. Each side will pay its own cost incurred on this appeal.

On both appeals, judgment modified and affirmed.

M. G. BROWN v. L. L. OWENS.

(Filed 23 February, 1921.)

Contracts—Consideration—Evidence—Questions for Jury—Trials.

In an action by a contractor to recover of the owner an additional amount to that specified in the contract to erect a house, evidence that the owner required the contractor to employ a certain class of labor, that increased the cost sixteen hundred dollars over the original estimate. of which the contractor agreed to lose four hundred dollars and the owner twelve hundred dollars, is sufficient as a legal consideration for the promise of the owner to pay the twelve hundred; and in this case it is for the jury to decide the questions raised, whether the new contract was to take effect only when reduced to writing and signed by the parties, or whether the alleged promise was made before or after the making of the original contract, or required a contractor's bond as a condition precedent to its taking effect.

APPEAL from *Calvert, J.,* at Spring Term, 1921, of CHOWAN.

Vann & Holland and Ehringhaus & Small for plaintiff.

W. S. Privett, Van B. Martin, and Meekins & McMullan for defendant.

WALKER, J. Action for the balance alleged to be due the plaintiff upon the construction of the defendant's residence, near Plymouth, N. C. There was a nonsuit, and plaintiff appealed. The plaintiff had proceeded with the work until his funds were exhausted, when he informed the defendant that he would be unable to complete it unless the latter would pay him the additional sum of twelve hundred dollars, which defendant agreed to do.

There is no evidence that plaintiff was acting in bad faith and attempting, by a species of duress, to extort money from the defendant, but there is, on the contrary, testimony tending to show that he was acting honestly and in good faith, his excuse for not going on with the work being that he was out of money, and that he would be required to spend more than the original amount contemplated, because the defendant had demanded that he do not employ any laborers from Plymouth, which increased the cost to $1,600 over the first estimate. Plaintiff agreed to lose $400 of this amount if defendant would pay him the balance, or twelve hundred dollars. There also was testimony to the effect that under the new agreement, if it may be so called, there were changes in the contract imposing certain duties and restrictions upon F. F. Muth, assignor of the plaintiff, for the benefit of the defendant. It is contended by the latter that the promise to pay the additional sum of twelve hundred dollars was without any consideration, and therefore not binding on him, and he therefore refuses to comply with it, as he has a legal right to do. If we, for the present, disregard these considerations, and the other as to the employment of costlier labor, at the request of the defendant, and view the case as one simply of a promise to pay the additional money provided Muth would go on with the work and complete the job, we find the authorities as to the validity and binding force of the promise somewhat at variance. Some cases hold that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his part of the contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one, *Munroe v. Perkins,* 9 Pick., 305; *Bryant v. Lord,* 19 Minn., 396 (Gil., 342); *Moore v. Locomotive Works,* 14 Mich., 266; *Goebel v. Linn,* 47 Mich., 489; 11 N. W., 284; *Rogers v. Rogers,* 139 Mass., 440; 1 N. E., 122; *King v. Duluth, Etc., Rwy. Co.,* 61 Minn., 482 (63 N. W. (Minn.), 1105); while others are to the effect that there is no consideration to support such a promise, the promisee having done no more than, in law, he was under an existing duty or obligation to do, and, therefore, having given nothing in return for what the other party had promised to pay, the promise is *nudum pactum.* This contention may be thus differently stated: A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise to perform, an existing legal obligation is not a valid consideration. The legal obligation may arise from the law independent of contract, or it may arise from a subsisting contract. It is further said by those who adhere to this view that what unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price, which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient. *King v. Duluth, Etc., Rwy. Co., supra.* The entire question, with a full statement of the different views advanced by the courts, will be found in 9 Cyc., pp. 347-353; and at p. 351 it is said that where one of the parties to a valid contract refuses to perform the same, and the other promises some additional consideration to induce him to do so, there is no enforceable promise, but some of the courts have held that a party to a contract has the right to elect whether he will perform the contract or abandon it and pay damages, which would discharge it (a breach and payment of damages being one method of doing so), and that his giving up of this right of election, therefore, furnishes a consideration for the new promise. The cases cited to support this proposition come from courts of the highest authority, and are collected in note 63 to the text. See, also, 13 Corpus Juris, secs. 210-216, and notes. There is a case substantially like this one, where the Court held that not only the doing of the labor and furnishing of the material, under the new arrangement, were of benefit to the owner of the building, who promised to pay the additional amount for the completion of the same, and therefore a sufficient consideration for the promise, but that a mistake of $500 which the contractors had made against themselves in their estimate of the cost of building the house also was such a consideration. *Cooke v. Murphy,* 70 Ill., 96.

But we need not determine at this time what the true rule is, for the decision of the question, even if the consideration is not otherwise sufficient in law, for there is evidence in this case, we think, of changes by the parties in the contract, which were sufficiently beneficial to the defendant, and detrimental to F. F. Muth, the contractor, to be a legal consideration for the promise to pay him the twelve hundred dollars. It is not conclusively shown, if it is shown at all, that the parties agreed that the new contract should not take effect and be in force until it was reduced to writing and signed by them. That is for the jury to decide, if the question is hereafter raised. In 9 Cyc., at p. 282, the matter is considered.

It does not appear clearly, as contended by the defendant, that the conversation as to the character of laborers to be employed occurred before or after the contract was originally made, and this requires the determination of a jury, nor does it appear that the giving of the bond, offered in evidence by plaintiff, a copy of which is annexed to the case, was a condition precedent to the performance of the defendant's promise to pay the twelve hundred dollars, but the contrary appears from Muth's testimony.

We need not consider the points arising upon the testimony as to the additional number of bricks required to build the pillars of the foundation, because of the peculiar lay of the ground at the site on his premises selected by the defendant for his residence. The pillars were to be four feet high, and it was found that they would have to be two and one-half feet higher to conform to the irregular surface of the lot. This matter need not be considered, nor that concerning the lights, because if plaintiff is entitled to recover anything, it was error to nonsuit him, and there is some evidence in the case which tends to establish his contention, as we have stated.

We have not discussed the facts or considered the merits of the case further than it was necessary to do so for obvious reasons. When all of the facts are disclosed, the case may present a very different aspect, if it comes back to us.

The case will be remanded, with directions to set aside the nonsuit and try the case before another jury.

New trial.

MARY CHURCHWELL, ADMX. OF E. B. CHURCHWELL, DECEASED, v. BRANCH BANKING AND TRUST CO., AND W. J. CHURCHWELL, ADMR. OF MARY E. CHURCHWELL, DECEASED.

(Filed 23 February, 1921.)

1. **Pleadings—Motions—Judgments—Demurrer.**

Plaintiff's motion for judgment on the pleadings is in effect a demurrer to the answer, admitting the allegations of fact therein, but denying their legal sufficiency to constitute a defense.

2. **Same—Defenses—Evidence—Questions for Jury.**

Where the plaintiff alleges that his intestate deposited a certain sum of money in defendant's bank, and the amount is claimed by the administrator of the mother of the deceased by allegation in his answer that tne plaintiff's intestate had given this deposit to his mother before his death, the co-defendant bank, alleging that the account had been transferred to the mother on its books and a new certificate of deposit issued to her, after intestate's death, in accordance with an expressed desire of the intestate that she should have it, the bank agreeing to pay the money as the Court should direct: *Held*, an admission that the deposit had been made and not drawn out by the depositor is insufficient to entitle the plaintiff to judgment on the pleadings in his favor; but that the issues made by the answer should be tried, the burden being upon the defendant to show to the jury the truth of their allegations by evidence, and therefore it was error for the trial judge to render a judgment on the pleadings in the defendant's favor.

CLARK, C. J., concurring.

APPEAL from *Cranmer, J.*, at the November Term, 1920, of WILSON.

This is an action to recover the amount ($2,000) of a deposit alleged to have been made with the defendant Banking and Trust Company on 1 September, 1917, by the plaintiff's intestate, E. B. Churchwell, who was her husband. The bank's original codefendant was Mrs. M. E. Churchwell, who was the mother of E. B. Churchwell, and upon her death the defendant W. J. Churchwell qualified as her administrator and became a party as defendant to the action.

The plaintiff claims that E. B. Churchwell made the deposit and received a pass-book, No. 5826, for the same, with the amount of the deposit entered therein. The defendant Churchwell admits the deposit by E. B. Churchwell, as we construe his answer, and that it was not paid to him, and that is about all he does admit. He denies that the money was there at E. B. Churchwell's death, or that the plaintiff is the owner of it or entitled to recover it as against his right thereto, as administrator of Mrs. M. E. Churchwell, and then he sets up defensive averments of fact in support of his claim, and particularly alleges that the right to the deposit by and with the consent and at the request of E. B. Churchwell, passed to his intestate prior to his and her death, and that plaintiff is not entitled to recover it from the bank, but that she should have judgment for it. The parties do not, it seems, substantially disagree as to what are the allegations of the pleadings, and if there is any such difference between their briefs in that respect we will settle it by referring to the statement in the bank's brief, which sets forth the substance of its answer with reference to what occurred in the bank concerning the deposit, as all of the parties refer, in one way or another, to this part of the bank's pleading, which is embraced in the following quotation from its brief:

"In paragraph four of the complaint the plaintiff says: 'The plaintiff is informed and believes, and upon such information and belief alleges, that the defendant Mary E. Churchwell is making a certain claim to said fund, and asserting that it is her individual property.'

"The defendant Branch Banking & Trust Company, answering the third paragraph of the plaintiff's complaint, says: 'It is true that on 1 September, 1917, E. B. Churchwell deposited in the savings department of this bank the sum of two thousand dollars, and in connection therewith, and in further answer to said paragraph, says that said E. B. Churchwell, when he came in said bank, stated to the officer in charge thereof that he, Churchwell, desired to make a deposit of two thousand dollars in the savings department if he could do so in such manner that his mother, Mrs. Mary E. Churchwell, could get the money at his death, and, then being in very precarious health, he further stated that if his mother could not get the said money at his death, he would not make the deposit. After some conversation with the officer of the bank, E. B. Churchwell becoming satisfied that by giving his pass-book to his mother, she could get the money, then and there made the deposit, and received pass-book No. 5826, with the name of E. B. Churchwell written thereon. That some time thereafter, while said Churchwell was confined to his room in the home of his mother, she sent the pass-book (No. 5826) to the savings department of the bank, with the request, as she said, from her son to have the fund transferred from the name of E. B. Churchwell to that of herself. Thereupon the officer in charge of the bank, having in mind the wishes and desires of E. B. Churchwell at the time he made the deposit, drew an ink line through the name of E. B. Churchwell on the ledger account in the bank and wrote the name of Mrs. W. J. Churchwell (who is the same person as Mary E. Churchwell) thereon, and issued a new pass-book, with the same number, No. 5826, to Mrs. W. J. Churchwell.'

"This new pass-book was then delivered to Mrs. W. J. Churchwell, and at the time of the death of E. B. Churchwell there was no fund or account of money in said bank in the name of E. B. Churchwell. As to which party, plaintiff as the administratrix of said E. B. Churchwell, or the defendant W. J. Churchwell, as administrator of Mary E. Churchwell, this fund belongs, the bank is unable to say, but is ready and prepared to pay the same with all interest thereon to whichever party the court may by judgment direct. The position of the defendant bank, being that his Honor below committed no error in refusing the plaintiff's motion for judgment on the pleadings, but that the pleadings raised issues of fact to be determined by the jury, under proper instructions from the court."

The section of the bank's answer which is copied from its brief shows that the bank is a mere stakeholder, and has no further interest in the controversy than to pay the money to its true owner, as established by the judgment of the court upon the facts as they may finally be ascertained.

The plaintiff, after the jury had been impaneled, moved for judgment upon the pleadings. This motion was refused, and she excepted, plaintiff stating that she had no evidence to offer other than the admissions in the pleadings. Judgment was entered refusing the motion, and further providing "that the plaintiff take nothing by the action, and that defendants go without day and recover their costs." Plaintiff appealed.

W. A. Finch and J. S. Manning for plaintiff.
Connor, Hill & Little for defendant Churchwell.
S. G. Mewborn for defendant bank.

WALKER, J., upon the above statement, delivered the following opinion for the Court: The refusal of the plaintiff's motion for judgment on the pleadings was manifestly correct. The plaintiff seeks to recover of the defendant bank the amount of the deposit made by her intestate, and the other defendant was made a party because she claimed an interest in the controversy, as her intestate had asserted ownership of the deposit by transfer to her, made by plaintiff's intestate, who was her son, just before his death.

The answers of the defendants are not so framed as to constitute judicial admissions of the plaintiff's cause of action, but, apart from the two admissions above stated, they merely state generally certain facts of a defensive character. We do not find such admissions in these pleadings as necessarily establish, as matter of law, the plaintiff's right to recover. The bank, it must be clearly understood, does not claim the fund, but admits that it holds it indifferently, as between the other parties, to await the decision of the court upon the question of its ownership. We will not undertake to pass upon the legal validity of the defenses until the facts are found, as the evidence may not support the defensive allegations, and the jury may find against defendants in respect to them, or the legal aspect of the case, if these allegations, for the time and for the sake of discussion, are admitted, may otherwise be changed so as to present entirely different questions of law. When we closely analyze the pleadings, we find that the only essential facts, which were admitted outright by the defendants, were that plaintiff's intestate deposited the money in the Banking and Trust Company, and that it had not been paid to him. Practically every other allegation is denied by the defendant administrator, either directly or by pleading new facts in explanation or defense and the banking company couples its admission of the deposit with averment of new matter. These answers, both of them, raise issues of fact, which should have been submitted to the jury.

The motion of plaintiff for judgment on the pleadings was in effect a demurrer to the answers, and being such, admitted the truth of the allegations of fact therein, but denied their legal sufficiency to constitute a defense. *Helms v. Holton,* 152 N. C., 587, 590. A motion for judgment upon the pleadings is in the nature of a demurrer, and every intendment must be taken against the party making such motion. Every fact necessary to be established as a basis for the judgment asked must be admitted either by a failure to deny specific allegations or by a specific admission of the facts, and averments in the pleadings of the moving party are not necessarily to be taken as true, unless there is an absolute failure to deny them, or unless they are so specifically admitted. *Alston v. Hill,* 165 N. C., 258; 31 Cyc., 605. We will, therefore, await the response of the jury to the issues of fact submitted to them before deciding the question of ownership, but approve the ruling of the court upon plaintiff's motion.

The judge, though, erred in further adjudging that defendants go hence without day, and taxing plaintiff with the costs of the action. This took her case out of court; whereas, she was entitled to stay in and have the issues determined. Her stating that she had no evidence other than the admissions of the pleadings to offer did not deprive her of this right. She had a *prima facie* case, or acquired the right to carry her case to the jury, by virtue of the two admissions. If the bank received the fund, and has not paid it to the depositor or to his representative, on demand, it is liable to plaintiff, unless in some way excused for the default, and the burden of showing this is upon it. If the other defendant claims the fund, he must show it. 5 Cyc., 517; *Egbert v. Payne,* 99 Pa. St., 239; *Bank v. Frankish,* 91 Pa. St., 339; *Graham v. Williams,* 21 La. Ann., 594; 9 C. B., 509; 67 E. C. L., 509. "A deposit should not be transferred from one account to another without ample authority, and what is sufficient authority is a question of fact (and law), which is to be answered whenever it arises." 5 Cyc., 518, and cases in notes 66 and 67. She says that her son gave it to her, the gift to take effect during his life, and further, that in accordance with his request or direction, he having turned over his pass-book to her, which she delivered to the bank, it was duly transferred to her on the ledger of the bank, and a new pass-book, having the same number, was issued to her.

The administrator of Mrs. Mary E. Churchwell relies much upon the allegation that his pass-book in the savings bank was delivered to her by her son, and that the transfer on the books of the bank was made during his lifetime, as constituting a valid gift *inter vivos.* There is some authority for the position (Magee on Banks and Banking (2 ed.), p. 336, citing *Goodrich v. Rutland Savings Bank,* 81 Vt., 147), but we merely refer to it without giving any opinion or intimation in regard to its correctness, as we are not called upon to do so at this time.

It is apparent that in the present state of the case we cannot determine who is the owner of the fund until the controverted facts are settled, one way or the other. Whether the defendants, or either of them, can establish, by legal evidence, the defenses pleaded is not now for us to say. They have, though, the right to be heard.

The ruling of the learned judge as to the motion of plaintiff is approved, and she will be taxed below with the costs of the motion. The remainder of the judgment was erroneous, and is reversed. The case will be tried in the usual course. The costs of this Court will be divided, plaintiff to pay one-half and defendants the other half.

Error.

CLARK, C. J., concurring: The plaintiff, who is the widow and administratrix, alleges in her complaint that her husband deposited $2,000 in the defendant bank, for which she brings this action to recover from the defendant bank, and makes the administratrix of her late husband's mother a codefendant. Both defendants answer and admit the deposit, but aver that during the lifetime of the plaintiff's intestate he transferred the deposit to his mother by giving her his pass-book, which she carried to the bank, and on its presentation to the bank the deposit was transferred to her during his life, in accordance with the printed regulations in the pass-book; and further, that when he made the deposit he stated to the bank that it was to go to his mother.

The plaintiff put on no evidence, and the court properly refused her motion for judgment upon the pleadings.

It was error, however, to direct a nonsuit for the answer, not setting up a counterclaim, was not to be taken as true because no denial was filed in reply. C. S., 543. It was therefore incumbent upon the defendant to put in proof before the jury of the matters set up in defense as to the validity of the assignment. The answer admitted that the deposit was made in the name of the plaintiff's intestate, but the allegation of the assignment was matter in defense, and was therefore to be proven, though the plaintiff did not file a denial.

The plaintiff was properly taxed with costs of the motion, and at the discretion of this Court the costs of appeal were equally divided. C. S., 1256.

L. E. FOUNTAIN v. CALVIN JONES.

(Filed 2 March, 1921.)

1. **Bills and Notes—Vendor and Purchaser—Sale and Return—Conditions.**
Where the note given for the sale of a horse stipulates that it must work all right or the maker of the note could return it in seven days from its date, it is called a "contract for sale and return" passing title to the maker subject to the right under the conditions stipulated for, to return within the time fixed, and demand cancellation of the note: and upon his failure to do this the sale becomes absolute.

2. **Same—Instructions—Burden of Proof—Appeal and Error.**
Upon the admission of the execution of the note sued on, "for the sale and return" of a horse, within a specified time, upon certain conditions, the burden of proof is on the defendant to show such facts, in compliance with the contract to return the horse in the time specified, as will avoid his obligation upon the note, and an instruction placing it upon the plaintiff, is reversible error.

3. **Same—Waiver—Agreements.**
Where there is evidence that the defendant offered to return a horse he had purchased from the plaintiff within the time stipulated in the note given for the purchase price, and thus avoid obligation thereon, but was twice persuaded by the plaintiff to give the horse other trials, the fact of such agreements would be a waiver of the return of the horse within the period specified in the note, and the second waiver prevents the plaintiff's objecting that the second offer to return the horse was not in a reasonable time, but thereafter the defendant could not use and keep the horse for six months without further tender of its return, if he had had reasonable opportunity to have done so.

APPEAL by plaintiff from *Cranmer, J.*, at November Term, 1920, of EDGECOMBE.

This is an action to recover a mare, and the balance due on a note.

The defendant executed to the plaintiff a note for $250, which sum represented the purchase price of the mare. The note was dated 29 March, 1918, and by its terms the plaintiff retained title to the mare to secure the purchase price. There was also written into the note the provision that the mare "must work o. k., if not (defendant) can return her in a week's time, seven days from date." The note matured on 1 November, 1918. Defendant did not pay the note or any part of the same at maturity. Plaintiff duly demanded payment of the note, and upon defendant's failure to pay instituted this action of claim and delivery, asking that he be declared entitled to the immediate possession of the mare for the purpose of selling her according to law and applying the net proceeds of sale on the note. He also asked for judgment against defendant for balance of note, after crediting on same the net proceeds from the sale.

Defendant admitted the execution of the note, and also admitted that he had not paid same, but claimed that he returned the mare within the seven days provided for in the note; that plaintiff persuaded him to try her again, and that after a sixteen days trial he again returned the mare, and was again persuaded by plaintiff to try her further; that he again took the horse home and tried her and found her unsatisfactory, but that he never saw plaintiff again, and was in possession of her when this action was started.

The first issue, addressed to the question as to whether plaintiff was the owner and entitled to the immediate possession of the mare, by virtue of the note retaining title, was answered in plaintiff's favor by consent.

The jury returned the following verdict:

"1. Is the plaintiff the owner of and entitled to the immediate possession of the horse in controversy? Answer: 'Yes.'

"2. What amount, if any, is the defendant indebted to the plaintiff? Answer: 'Nothing.'

"3. In what sum, if any, is the plaintiff indebted to the defendant on his counterclaim. Answer: 'Nothing.' "

His Honor charged the jury on the second issue as follows, to which the plaintiff excepted: "I charge you that as to the second issue, the burden rests upon the plaintiff to satisfy you by the preponderance, that is, the greater weight of the evidence, that he is entitled to have same answered in his favor. Now, if you find by the greater weight of the evidence that the defendant did not return the horse within seven days from the date of the note, then I charge you that it would be your duty to answer the second issue in such sum as you may find to be due. But if you do not so find, then you should answer the issue 'Nothing.' "

There was a judgment in favor of the defendant, and plaintiff appealed.

G. M. T. Fountain & Son for plaintiff.
No counsel for defendant.

ALLEN, J. The contract covered by the note offered in evidence is called in the law books a "contract for sale and return," and under its terms the title to the mare passed to the defendant, subject to the right of return within the time fixed, and to demand the cancellation of the note, and if he failed to exercise this right the sale became absolute, and the purchase price could be recovered.

As said in 35 Cyc., 237, and approved in *Mfg. Co. v. Lumber Co.*, 159 N. C., 510: "Where the contract provides for a return of the goods if not satisfactory, the buyer cannot relieve himself from liability for the price, unless he returns or offers to return them, and the offer to return must be unconditional."

It follows, therefore, as the defendant admitted the execution of the note, and as it was incumbent on him to prove a return of the horse within seven days in order that he might be relieved from responsibility, it was error to place the burden of proof on the plaintiff on the second issue, and to require him to prove the negative—that the defendant did not return the horse within seven days—before the issue could be answered in his favor.

It was also erroneous to instruct the jury to answer the issue "Nothing" unless they found that the defendant did not return the horse within seven days, because this ignores the evidence to the effect that although an offer to return was made, the defendant agreed to give the horse another trial, and again after sixteen days and complaint made, concluded to try the horse further, and thereafter made no further objection and no further effort to return the horse.

If the defendant offered to return the horse within seven days, and was persuaded to make another trial of the horse, this would be a waiver of the stipulation for the return within seven days, and if after sixteen days he again offered to return the horse, and it was agreed that there should be a further trial, this would prevent the plaintiff from objecting that the second offer of return was not within a reasonable time, but the defendant could not thereafter keep and use the horse for a period of six months without further tender of return, if there was reasonable opportunity to do so, and then avoid liability on the note, under the stipulation in the note giving the right to return the horse if not satisfactory.

There must be a new trial because of error in the charge.

New trial.

J. D. CRAFT & COMPANY AND C. C. BERGESON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 2 March, 1921.)

1. Drainage — Canals — Duty of Abutting Owners — Cleaning Ditches — Damages.

Where a drainage canal has been established and used as of right by abutting proprietors, in the absence of statutory or other valid contract or prescription regulation to the contrary, the obligation is upon each of the proprietors to clear out and properly maintain the portion of the canal running through his own land, and ordinarily, he has no right to compel an upper proprietor to do this for him, nor to hold him in damages for not doing it.

2. Same—Statutes—Courts.

Where the main canal for the drainage of a large area of land has been used for drainage by a number of abutting owners as a matter of right, in this case, for sixty years, or for a period of seven years or more, in the absence of contract, stipulation or statutory or prescriptive provisions, our statutes have prescribed a method to proportion the burdens of care, upkeep and maintenance of the main canal among the adjoining owners, to be determined on petition to be duly filed before a justice of the peace or clerk of the Superior Court, who shall, by commissioners or jury of view, cause the respective obligations and burdens to be ascertained and fixed and apportioned among the respective proprietors, enforcible upon the report accordingly made and confirmed. C. S., secs. 5272, 5273, 5274, 5280, *et seq.*

APPEAL from *Calvert, J.*, at January Term, 1921, of WASHINGTON.

Plaintiffs, lower proprietors, owning land abutting on both sides of a drainage canal used by them in part for draining their lands, sue the defendant, one of a number of upper proprietors also abutting on said canal, and using the same for drainage, for damages to plaintiffs' land, and crops particularly for the year 1919, caused by the negligent and wrongful failure of defendant to clear out and properly maintain the portion of said canal running through the lands of plaintiff and below same. On denial of liability, a jury was impaneled, and at close of plaintiffs' evidence, on motion, there was judgment of nonsuit.

Plaintiffs excepted and appealed.

Ward & Grimes for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. The evidence offered in support of plaintiffs' cause of action tended to show that the McRae Canal was a drainage canal from two to three miles in length, lying in said county, having its outlet into Beaver Dam Swamp some distance below lands of plaintiffs. That it has been established for sixty years and more, and used by abutting proprietors for drainage purposes, the lands affected amounting to twenty-five hundred to three thousand acres. That plaintiffs, lower proprietors, owned a tract of about seventy acres of land on either side of this canal, about forty acres of which were cleared and in part drained by the use of the McRae Canal. That defendant, one of a number of upper proprietors, also using said canal for drainage, owned a large body of land, the second tract above plaintiffs' land from four to six hundred acres of which were cleared and drained by ditches leading into the main canal. That the portion of the McRae Canal within the bounds of plaintiffs' tract had been allowed to fill up so that it did not afford proper drainage for same, and that on very slight rains the water would pond back into plaintiffs' ditches and sob and injure their lands, and particularly in

1919 caused great damage to the crops of plaintiffs, planted and growing thereon. That this was due to the alleged wrongful failure on the part of defendant to clear out the portion of the McRae Canal on plaintiffs' tract, which had been filled up two to three feet above the original bottom, and caused in part by defendant's drainage into same. On these the facts chiefly pertinent to the inquiry, the authoritative decisions here and elsewhere are to the effect that where a drainage canal has been established and used as of right by abutting proprietors in the absence of statutory contract or prescriptive regulation to the contrary, the obligation is upon each of the proprietors to clear out and properly maintain the portion of the canal running through his own land, and ordinarily he has no right to compel an upper proprietor to do this for him, nor to hold such proprietor in damages for not doing it. The general principle as stated was approved and applied by this Court in the recent case of *Lamb v. Lamb,* reported in 177 N. C., 150. There Abner Lamb, a grandfather, and owner of a large body of land, having established and maintained a system of drainage for same, permanent in character, died leaving his lands to his two sons in separate tracts as upper and lower proprietors along the lead ditches constituting principal features of said drainage system. Plaintiff, successor in title to the proprietor of the lower tract, sued the successor and proprietor of the upper tract for failure to keep open and maintain the lead ditches through plaintiff's land.

On the facts suggested, relief was denied to plaintiff, and speaking to the principal question, the Court said: "It is undoubtedly the general rule that, in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone; that he has a right of entry upon the servient estate for the purpose indicated, and may be held liable for injuries arising from his willful or negligent breach of duty in these matters. The position finds support in *Hair v. Downing,* 96 N. C., 172, one of the North Carolina cases heretofore cited, and is very generally approved in the decisions and text-writers on the subject. *Bellevue v. Daly,* 14 Idaho, 545; *Oney v. West Buena Visto Land Co.,* 104 Va., 580; *Dudgeon v. Bronson,* 159 Indiana, 652; 9 R. C. L., 794-795; 14 Cyc., 1209; Jones on Easements, sec. 821. But in such case the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may, ordinarily, abandon it altogether, without infraction of any rights of the servient owner. 9 R. C. L., 795, citing *Pomfret v. Ricroft,* 1 Saund., 321; 10 Eng. Rul. Cases, 16, and *Mason v. Shrewbury, etc., Ry. Co.,* L. R., 6 Q. B., 578; 10 Eng. Rul. Cas., 22, and note, a general principle recognized and applied in this State in *Canal Co. v. Burnham,* 147 N. C., 41. But where, as in this case, a system of drainage has been constructed for the benefit of the two properties, and is used and enjoyed by the owners of both, the general rule is, or should be, as held by the court below, that each is required to maintain the portion of the system on his own land, unless the conditions and circumstances presented should make such an obligation so unequal and burdensome on one at the expense of the other that a different method of adjustment would be required."

In *Lamb's case*, 177 N. C., 150, it was suggested that as between two proprietors, in case of gross inequality, a different method of adjustment might be upheld and applied by court decision, but where there are more than two proprietors, and in any case in the absence of some intelligent and legalized administrative regulations apportioning the respective burdens, the difficulties of making proper adjustment of these claims by ordinary civil action alone would be well nigh insuperable. Recognizing this, our Legislature has wisely enacted, in addition to the statutory provisions for the creation of regular drainage districts, that wherever a drainage canal has been established and used as of right by abutting proprietors in the absence of contract stipulation or statutory or prescriptive provisions controlling the matter, the question of proportionate burdens may be determined on petition duly filed before a justice of the peace or clerk of the Superior Court, who shall by commissioners or jury of view, cause the respective obligations and burdens to be ascertained and fixed and apportioned among the respective proprietors, and on this report duly made and confirmed, collection may be enforced as the statute provides. 2d Consolidated Statutes, secs. 5272, 5273, 5274, 5280, *et seq.*, sec. 5280 providing, among other things, that "whenever a canal has been dug along any depression or water way, and been maintained for seven years, it shall be *prima facie* evidence of necessity," and proceedings may be had for apportionment and collection of the respective burdens, etc. We were referred by counsel for appellant to the case of *Briscoe v. Parker*, 145 N. C., 14, as authority in favor of his present claim, but in that case no canal had been established, and it was held that when an upper proprietor had gathered his drainage water into ditches and so carried it up against a lower proprietor's land without more causing said water to "ooze through and sob and injure the same, an action would lie for the injury." But here, as stated, a canal had been established for sixty years and more and used as of right by abutting proprietors, and the question presented is not one of trespass, but of proper apportionment of the respective burdens, and on the facts as now presented the statutory method of relief is the only one open to plaintiffs.

On the record we find no error in the judgment of nonsuit, and the same is

Affirmed.

SHAW COTTON MILLS v. ACME HOSIERY MILLS.

(Filed 2 March, 1921.)

1. Appeal and Error—Harmless Error—Evidence—Contracts—Trials.

Mere error in the trial of a cause will not be considered as reversible error unless made to appear to have been material and prejudicial to appellant's right; and where damages are sought as a counterclaim to plaintiff's action on contract, involving the plaintiff's failure to ship a specified amount of cotton yarns at a certain price, the damages claimed by defendant being those occasioned by a rising market, it is harmless error for the court to admit evidence of defendant that it had bought from another mill yarns at a certain higher price, when in corroboration of other testimony that it was necessary to pay this price to supply the deficiency, caused by plaintiff's breach.

2. Same—Instructions.

Where the damages sought for the breach of plaintiff's contract, by counterclaim, are the difference between the contract price and the market value of cotton yarns at the time of the alleged breach, and the court has properly charged the jury accordingly, and there is evidence that the price of the yarns has continued to advance, it is harmless error to admit on the trial, in corroboration, the price of the yarns at that time.

3. Contracts—Breach—Evidence—Declarations.

Where the defendant has rejected certain yarns shipped by plaintiff as not coming up to contract, statements in plaintiff's letters to defendant that these yarns had been shipped to others without objection, as tending to show that defendant should have accepted them, are self-serving and properly excluded as evidence in plaintiff's favor; especially when it appears that the plaintiff accepted the returned shipments without objection.

4. Contracts—Breach—Evidence—Substantial Compliance—Trials—Questions for Jury.

The plaintiff contracted to deliver to the defendant "approximately 1,000 pounds" of yarn a month, for a certain year at a stipulated price: *Held*, a subsequent correspondence between the parties showing that plaintiff understood the contract as calling for sufficient yarns for that year to meet defendant's requirements, approximating 12,000 pounds, is sufficient upon which to submit to the jury the issue, "Did the plaintiff contract to deliver to defendant 12,000 pounds of cotton yarns?" etc., there being evidence that the plaintiff only shipped 11,244 pounds, and the defendant had to buy the deficiency on a rising market.

APPEAL by plaintiff from *Devin, J.*, at June Term, 1920, of HALIFAX.

Civil action, brought by plaintiff to recover the sum of $286.94 for certain yarns sold and delivered to the defendant during the years 1915 and 1919. Defendant admitted receipt and nonpayment of said goods, but set up in defense, and by way of counterclaim, two causes of action, each for an alleged breach of contract, as follows:

1. That during the month of October, 1914, the plaintiff contracted and agreed to sell the defendant sufficient splicing yarn to supply its needs for the year 1915, estimated at 12,000 pounds, at 24 cents per pound; that of said amount plaintiff delivered 11,244 pounds only, leaving 756 pounds due and unfilled on said contract.

2. That during the month of April, 1919, plaintiff contracted and agreed to sell the defendant 15,000 pounds of splicing yarn at 65 cents per pound, for delivery within six months; that of said amount plaintiff only shipped 8,627 pounds, a portion of which was returned and accepted by plaintiff, leaving 8,262 pounds of yarn due and unfilled on said contract.

Upon issues joined the following verdict was rendered by the jury:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: '$286.94, with interest from 10 August, 1919.'

"2. Did the plaintiff contract to deliver to defendant 12,000 pounds of splicing yarn during the year 1915, as alleged in answer? Answer: 'Yes.'

3. "If so, did the plaintiff fail to comply with said contract? Answer: 'Yes.'

"4. What damage is the defendant entitled to recover therefor? Answer: '$74.60.'

"5. Did the plaintiff contract to deliver to the defendant 15,000 pounds of splicing yarn in 1919, as alleged in the answer? Answer: 'Yes.'

"6. Did the plaintiff wrongfully fail to comply with said contract? Answer: 'Yes.'

"7. What damage, if any, is the defendant entitled to recover therefor? Answer: '$1,684.80.' "

Judgment on the verdict in favor of the defendant for the sum of $1,427.86. Plaintiff excepted and appealed.

Travis & Travis, W. L. Knight, R. C. Dunn, and Daniel & Daniel for plaintiff.

George C. Green, H. M. Robins, and J. A. Spence for defendant.

STACY, J. There are 49 exceptions in the record, 35 of which relate to the admission and exclusion of evidence, one to the submission of the second issue to the jury, two to the court's refusal to give special prayers for instruction, seven to his Honor's charge, and the remaining four to the formal rendition of judgment.

Several exceptions, directed to the court's ruling upon questions of evidence, merit our attention and consideration.

The defendant was permitted to offer in evidence, over the plaintiff's objection, an invoice of yarn bought by the defendant from the Magnolia Mills at Charlotte, N. C., 25 October, 1919, showing the price paid at that time to be $1.05. This, standing alone, would be objectionable, but the witness had previously testified that he had paid $1.05 for yarn to supply the deficiency of plaintiff's shipments. The evidence was offered in corroboration. Viewing it in this light, even if inadmissible, we think its effect was harmless. Mere error in the trial of a cause is not sufficient grounds for a new trial. It should be made to appear that the ruling was material and prejudicial to appellant's rights. *S. v. Smith,* 164 N. C., 476; *Schas v. Assurance Society,* 170 N. C., 420; and *Brewer v. Ring and Valk,* 177 N. C., 476.

Again, defendant was permitted to show, over plaintiff's objection, the price of yarn at the time of trial. His Honor restricted this to corroborating evidence—testimony having been offered that the price of yarn had continued to rise, from time to time, since the execution of the contract. Furthermore, upon the measure of damages the court instructed the jury that they should limit their award to the difference between the agreed price and the market price at the time of the breach of the contract. This apparently was sufficient to cure any objection.

A mass of correspondence between the parties was offered in evidence, and his Honor instructed the jury not to consider statements contained in the letters of the plaintiff to the effect that the rejected yarn and other yarn had been shipped to different customers and that no complaint had been made by them. Plaintiff contends this was evidence going to show the yarn to be of the character called for in the contract. These declarations, at most, were self-serving and tended only to prove a negative. Hence, their exclusion could not be held for reversible error. But this position was not insisted on at the time. Plaintiff accepted the yarn as shipped back, without objection, and credited the same on the defendant's account.

We have carefully examined the remaining exceptions, touching questions of evidence, and find them to be untenable.

The plaintiff objected to the submission of the second issue to the jury, and contended that the court should have held as a matter of law that the shipment of 11,244 pounds of yarn during the year 1915 was a substantial compliance with its contract. The original correspondence relative to defendant's requirements, which the plaintiff agreed to fill, used the words: "approximately 1,000 pounds monthly for the year 1915." But at a subsequent date, replying to an inquiry from the plaintiff as to the amount, the defendant stated: "We understood we were to have 1,000 pounds of yarn per month for a term of 12 months. Please acknowledge receipt of this letter and state when we may expect the first shipment to start out." Plaintiff answered on 17 September, 1915, as follows: "Replying to your favor of the 15th, we will begin shipping again next week." Later, on 21 December, 1915, plaintiff wrote the defendant: "Some time in September you raised the question about our delivering the balance of your order, and in order to satisfy you that we would live up to our end of the agreement we shipped you faster than the contract required, and as the order was not for 12,000 pounds, but for your requirements during the year 1915, approximately 1,000 pounds monthly, and under this contract if for the conduct of your business you had required 13,000 pounds we would have furnished same, but as 11,244 pounds, as per your statement, has met your requirements, we are relieved from further shipments under this contract."

Under this correspondence, we think his Honor properly submitted the second issue to the jury, and that the answer was justified by the evidence.

No material benefit would be derived from considering all the exceptions and assignments of error in detail. A perusal of the charge given by the learned judge who presided at the trial of this cause shows that the case was tried with care and with due regard for the rights of the parties. There was no error in his refusal to give the plaintiff's first prayer for instruction—the second seems to have been given—and we do not think the exceptions to the charge as given can be sustained.

Upon the whole record, after a careful and painstaking investigation, we find no material or prejudicial error. The controversy was largely one of fact, tried before a jury of plaintiff's own county, and agreeable to its selection. We have found no sufficient reason for disturbing the verdict and judgment.

No error.

JANICE MIZELL BY W. J. MIZELL, NEXT FRIEND, V. ATLANTIC COAST LINE RAILROAD COMPANY AND DIRECTOR GENERAL OF RAILROADS.

(Filed 2 March, 1921.)

1. **Removal of Causes—Petition—Verification—Principal and Agent.**

   Semble, an attorney with authority to sign bonds and other instruments required in courts and other legal proceedings, without further authority to verify pleadings in behalf of his principal, is insufficient to confer authority upon the agent to verify the petition in behalf of the principal to remove a cause to the Federal courts.

2. **Removal of Causes—Diversity of Citizenship—Domestic Corporations—Railroads.**

   The Atlantic Coast Line Railroad Company is, under the provisions of its charter, a North Carolina corporation, and may not, therefore, remove a cause against it to the Federal court under a petition averring that it is a nonresident of this State, under the Federal Removal Act for diversity of citizenship. *Cox v. A. C. L. R. R. Co.*, 166 N. C., 652, cited and applied.

3. **Removal of Causes—Railroads—Director General—Parties—Right to Remove—Domestic Corporations.**

Under the Federal act placing the railroads under the Director General of Railroads as a war measure, both the railroad and the Director General, for the purpose of removal of a cause from the State to the Federal court, are one and the same, and properly joined as parties defendant, and the right to remove does not exist where the railroad, seeking it, is not a foreign corporation.

4. **Removal of Causes—Vested Rights—Constitutional Law—Railroads—War.**

Where an injury, the basis of an action for damages against a railroad company, occurred before the railroads were discharged from Federal control, the right of action vested at that time and is "property" within the meaning of the Constitution, which the statute returning the railroads to private ownership cannot defeat or modify.

5. **Removal of Causes—Railroads—War—Federal Statutes—Constitutional Law.**

Neither a domestic railroad company nor the Director General of Railroads has the right to remove an action brought in the State court for damages for a personal injury, to the Federal courts, under the Constitution and statutes of the United States, on the ground of diversity of citizenship. Such right is not given, but to the contrary, is prohibited, in the transportation act of Congress, approved 21 March, 1918, nor can it be inferred from the fact that the act of Congress of 1920, restoring the railroads to private control, is silent as to the removal of causes.

APPEAL by defendants from *Lyon, J.*, at November Term, 1920, of BERTIE.

This is an action to recover damages for personal injuries sustained by the plaintiff, while a passenger, in alighting from the passenger coach. The injury occurred and the cause of action arose 19 December, 1919, during Federal control. The action was begun 28 September, 1920, after the termination of Federal control. The complaint was filed 5 October, before the return date of the summons, and on 23 October, 1920, the defendants filed their petition for removal to the Federal Court, together with their answer. The cause was transferred by the clerk to the Superior Court docket, and at the first term the motion to remove to the Federal Court was denied. Both defendants joined in the motion to remove—John Barton Payne having been substituted for Walker D. Hines as Director General. From the refusal of the petition for removal both defendants appealed.

Winston & Matthews for plaintiff.

P. A. Willcox, Gillam & Davenport, and A. L. Hardee for defendants.

CLARK, C. J. The plaintiff, a student in Greenville, N. C., purchased a ticket to Aulander, in Bertie County, N. C. As she was leaving the train at the latter point the injury occurred, as the complaint avers, for the want of a footstool or any assistance to alight, the distance between the lower step and the ground being about 30 inches.

The petition for removal to the Federal Court avers that the Atlantic Coast Line is a foreign corporation, and a nonresident in the State of North Carolina. It also alleges that Director General Hines resides in New York, and John Barton Payne, who was substituted as a defendant, is a citizen of Illinois, and both are nonresidents of this State. The defendants appealed from the refusal to remove, which is the only matter presented for review.

The petition to remove is verified by P. A. Willcox, as attorney in fact for the Atlantic Coast Line, but the power of attorney under which he acted empowers him only to "sign bonds and other instruments" required in courts and other legal proceedings. It gives him no authority to verify pleadings, and it would seem the petition is insufficiently verified. We need not discuss the allegation that the Atlantic Coast Line is a nonresident. In *Cox v. R. R.,* 166 N. C., 652, this point was fully considered and it was held that the Atlantic Coast Line Railroad Company was not entitled to a removal of its cause from the State court to the United States Court on the ground of being a nonresident corporation, and that under the provision of its charter on this question of removal it is a domestic corporation. This case has been reaffirmed in *Brown v. Jackson,* 179 N. C., 365 and 375. It was also so held in *Staton v. R. R.,* 144 N. C., 145, and *Spencer v. R. R.,* 166 N. C., 522.

As to the Director General, the right to remove is also expressly denied in *Hill v. R. R. and Director General,* 178 N. C., 607, and we have divers cases since affirming the holding in that case that the Director General and the corporation for the purpose of an action of this kind are one and the same, and both are properly joined as parties. Indeed, in this present case we find Mr. Willcox verifying the pleadings for the Director General under the alleged authority of the corporation as its attorney in fact.

The statute creating the position of Director General expressly denies the right of removal except in cases where the right of removal was vested in the corporation prior to the passage of the act. As the Atlantic Coast Line had no such right, the Director General was not entitled to it.

The defendants contend, however, that they have a right to remove upon the ground that the cause of action is one "arising under the Constitution and laws of the United States." This is incidentally mentioned in the petition, but it seems was not argued below.

The injury occurred and the cause of action arose 19 December, 1919, before the railroads were discharged from Federal control. Action could have been instituted that day. A vested right of action is property. The statute may change the remedies, but cannot defeat or modify a right of action that has already accrued. *Williams v. R. R.,* 153 N. C., 360, and this cause of action arose at the very moment the injury occurred. *Hocutt v. Wilmington,* 124 N. C., 214.

On 19 December, 1919, when this cause of action accrued, the railroad company was under the operation of the Transportation Act, approved 21 March, 1918. But that act did not create or confer this cause of action, nor did it arise under or by virtue of that statute. Both North Carolina and Virginia had prior thereto adopted "Lord Campbell's Act." The plaintiff's cause of action did not arise out of the Federal statute, which, moreover, denies the right of removal of actions against railroad companies except in cases where the right to remove existed prior to that statute, 40 United States Statutes at Large, Part I, p. 457. Prior to that act the Atlantic Coast Line could not have removed this cause to the Federal Court, *Hill v. R. R.,* 178 N. C., 607, because no Federal right or immunity was involved, nor diverse citizenship, and the action could not have arisen under the Constitution and laws of the United States.

The plaintiff's cause of action accrued prior to the act of 20 February, 1920, effective 1 March, 1920. Besides, that act is silent as to the removal of causes, while under the act of 21 March, 1918, above mentioned, the carrier, and of course the Director General, could not remove any action that had been brought, or might thereafter be instituted, by or against it, and this action has been begun since that date. Congress did not undertake, after Federal control had ceased, to regulate causes that had accrued during such control.

The refusal to dismiss the action as to the defendant company because John Barton Payne, Director General, is a party defendant is not before the Court, as he did not except on that ground, but that proposition has been discussed and denied at this term, citing our decisions, in *Parker v. R. R. and Director General, post,* 95. The question before us is one of removal pure and simple. Besides, John Barton Payne has filed an answer in this case on the merits, reserving only his rights under the motion to remove.

The act of 21 March, 1918, provides: "Such actions, suits, and proceedings may, when within the period of limitations now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which but for Federal control would have jurisdiction of the cause of action had it arisen against this carrier." This explicit authority recognizing the jurisdiction of the State courts is exclusive.

The question does not arise whether a corporation chartered by an act of Congress would have the right of removal, for the defendant, the Atlantic Coast Line Railroad Company was not made a Federal corporation by the statute appointing a manager for domestic railroad companies as a war expedient. National banks are creatures of National legislation, and a receivership of a National bank occupies the same status, but that is a different proposition from the appointment of the Director General over State corporations as to which the Director General has the same status as regards removal as the corporation itself would occupy. The brief of the defendants admits that the Federal Control Act contains an apparent prohibition against the removal. All the cases cited by defendants, in which removals were allowed on the ground of "a right arising under the Constitution and laws of the United States," are where the corporation was created under a Federal charter, which is not the case with the Atlantic Coast Line Railroad Company.

The defendants claim, also, that as the first act establishing Federal control contained a prohibition against removal, and the second act repealing Federal control does not, that therefore the right to removal exists. This is a *non sequitur,* and there is even a very strong implication against it in the latter act, when it says, as above cited, that "such actions, suits, or proceedings may not later than two years from passage of this act be brought in any court which but for Federal control would have jurisdiction of the cause of action." The Superior Courts of this State had jurisdiction of this action at the time it accrued, and removal to the Federal Court was at that time prohibited, and there is no statute since that has authorized it. The mere failure to again prohibit removal in the act abolishing Federal control cannot possibly have such effect.

The petition to remove was properly denied.

Affirmed.

A. C. HOUSE v. SURRY PARKER.

(Filed 2 March, 1921.)

Vendor and Purchaser—Title Retained—Power of Sale—Statutes—Foreclosure.

A contract for the sale of personal property, retaining title in the vendor until the purchase price has been paid, without express power of sale therein, comes under the provisions of C. S., 2587, as if written in the contract, and gives to the vendor the right to sell the property in default of payment of the purchase price, or part thereof, without consent of court, upon certain advertisement specified in the statute; and it is reversible error for the court to charge the jury that the vendor could not sell the property without the consent of the purchaser.

APPEAL by defendant from *Lyon, J.,* at August Term, 1920, of HALIFAX.

This was a civil action for damages, tried upon an alleged wrongful conversion of plaintiff's property by the defendant, Surry Parker.

In July 1916, plaintiff, a resident of Halifax County, purchased from the defendant, who resided at Pinetown, N. C., a steam logging loading outfit upon a retained-title contract. The terms of said agreement, touching the reservation of title, were as follows:

"The condition of the above contract is that the legal title and right in and to the above described property is to remain and be vested in Surry Parker, Pinetown, N. C., until the said notes, and all interest thereon accrued, are paid off; and in case the said party of the second part should fail to pay off the amount due by the said notes, or either of them, at maturity, then the entire debt shall become due and payable, and it shall be lawful for the said Surry Parker, Pinetown, N. C., to take possession of the said property at any time thereafter; but in case the said notes are paid off, then the title of said property to vest in the said party of the second part."

The machinery was shipped by freight to the plaintiff at Garysburg, N. C., bill of lading for same being attached to draft and sent to the Bank of Weldon, with instructions to notify plaintiff. Pending negotiations between the parties as to the correctness of said draft and the execution of the purchase-money notes, the shipment was returned by the railroad companies to the point of origin.

Plaintiff then instructed the defendant to hold the machinery at Pinetown until he could arrange to pay for it, or until he could sell it. There was evidence tending to show that the plaintiff's mill had been shut down, in the meantime, and that he desired to sell said machinery at Pinetown, if he could do so to advantage.

Upon failure of the plaintiff to pay his last note at maturity defendant sold said property at public auction, as security for his claim. The amount received at said sale was insufficient to pay the balance of the debt. With respect to defendant's right to sell the machinery after due notice, and apply the proceeds to the payment of the purchase money, his Honor charged the jury: "But if you should find that after this property was shipped back to Pinetown, House ratified the reshipment, and agreed to let the property remain there in the hands of Parker, to be disposed of by him, and that he made the best disposition that he could under the circumstances, though he had no right to sell it under the contract of sale, there being no power of sale in the contract, and has brought no suit to foreclose the sale, he could only sell it by the consent and direction of House." Defendant excepted.

Judgment in favor of the plaintiff on the verdict, and the defendant appealed.

W. E. Daniel, G. E. Midyette, and George C. Green for plaintiff.
Ashley B. Stainback and Daniel & Carter for defendant.

STACY, J. Sec. 2587, C. S., relating to the foreclosure of conditional sales, provides as follows: "In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any surplus to the person legally entitled thereto. Before making any such sale, in addition to the advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns."

Under a proper construction of this statute, and on the record, we think his Honor erred in charging the jury that the defendant could not sell the property in question without the consent and direction of the plaintiff. It is true the contract contains no express power of sale; but the general laws of the State in force at the time of its execution and performance enter into and become as much a part of the contract as if they were expressly referred to or incorporated in its terms. *O'Kelly v. Williams,* 84 N. C., 281; *Graves v. Howard,* 159 N. C., 594, and *Van Huffman v. Quincy,* 4 Wallace, 552.

There are other exceptions worthy of consideration, but as the case goes back for a new trial, and as they may not occur on another hearing, we refrain from further comment.

New trial.

HIGHWAY COMMISSION OF HALIFAX COUNTY v. H. B. VARNER ET AL., DIRECTORS OF THE STATE PRISON.

(Filed 2 March, 1921.)

1. **Statutes—Interpretation—Ambiguity.**

When the language of a statute is unambiguous and the intent is plain, there is no need for its construction by the courts, and it is the duty of the courts to enforce it according to its obvious terms and meaning.

2. Same—Roads and Highways—Road Commissioners—Repealing Statutes—Mandamus.

Where a statute, as amended, directs the construction and repair of a certain public highway in a township by the directors of the State Prison, to be done in accordance with and under the direction of the Highway Commissioners of the township, and place thereon, not later than a certain date, a certain force of convicts, suitable teams, etc., and thereafter withdraws from the township commissioners of the county the power to construct, maintain, and improve the public roads of the townships, and gives it to the Highway Commissioners of the county, created by the act, repealing all laws or parts of laws in conflict therewith, including in specific terms "special or local laws authorizing the raising of money for the purpose: *Held,* the former acts are 'local' or 'special,' and their provisions are repealed by the latter act; and an order for a mandamus brought by the county Highway Commission against the directors of the State Prison to compel them to construct, etc., the road as specified in the former statute, will be denied by the courts. As to whether mandamus was proper remedy, *Quere?*"

ACTION for a mandamus. Appealed from *Kerr, J.,* at January Term, 1921, of HALIFAX.

The object of the action is to compel the defendants to comply with the following provisions of Public Laws of 1913, chapter 65, as amended by Public Laws of 1915, chapter 52, the amended law being as follows:

"SECTION 1. That the directors of the State's Prison be and they are hereby authorized and directed to repair and construct by use of convicts of the State's Prison a public highway in Halifax Township, Halifax County, leading from the town of Halifax to Connoconnara Swamp in the direction of the State farm, the same being the public road leading from said town to the State farm.

"SEC. 2. That this work shall be done in accordance with and under the direction of the highway commission of Halifax Township: *Provided,* that the time for the use of the convicts under this act shall be in the discretion of the superintendent of the State's Prison, and their use shall not conflict nor interfere with the general work of the State farm."

The following provision was added to section 2 by chapter 52, Public Laws of 1915: "That this work shall be done in accordance with and under the direction of the highway commission of Halifax Township, and said directors of the State's Prison shall place on said road not later than August first, nineteen hundred and fifteen, a force of convicts not less than thirty in number, with suitable teams, and so forth, not less than forty mules, with wagons and tools, and keep the same there until said work is completed: *Provided,* that the directors of the State's Prison may not be required to build a more expensive type of road than the roads built under the bond issue by the highway commission of said township."

By Public-Local Laws of 1919, chapter 534, the general supervision and authority over public highways, and road and bridge construction, improvement and maintenance were withdrawn from the townships and given to the county, acting through and by the "highway commission of Halifax County," which body is created by that act. Section 22 of that act provides, as follows:

"All special or local laws relating to the construction, improvement, or maintenance of public roads or bridges of Halifax County, or of any township therein, including special or local laws authorizing the raising of money for said purposes, are hereby repealed. All laws and parts of laws in conflict with this act are also repealed. Nothing in this act, however, shall be held to invalidate any indebtedness incurred under any law hereby repealed, or to invalidate any act done under such a law, or to prevent the collection of any taxes levied under such law."

The court, upon the pleadings and statutes, rendered judgment for the plaintiff, and defendants appealed.

George C. Green for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendants.

WALKER, J., after stating the case: The question on which the decision of this case turns is whether the act of 1919 repealed the acts of 1913 and 1915 so as to destroy the plaintiff's cause of action. We are of the opinion that they did, plainly and expressly, or, at least, with sufficient certainty to show that it was the intention of the Legislature to do so. If the Legislature had simply created the "highway commission of Halifax County" without more, the contention of the plaintiff would have some plausibility, and would impress us more favorably, but the language of the act of 1919 is so clear, explicit, and comprehensive that we can give it but the one meaning, and therefore it requires no construction. We interpret it as it is written, and as its manifest meaning and intention are disclosed by its words.

It is familiar learning that there is no ground for construction when the language of a statute is unambiguous and the intent is plain. Black on Interpretation of Statutes, pp. 35 and 36; *Whitford v. Ins. Co.,* 163 N. C., 223; *S. v. Barco,* 150 N. C., 792; *Pugh v. Grant,* 86 N. C., 40; *U. S. v. Fisher,* 2 Cranch. (U. S.), 358 (2 L. Ed., 304); *Dewey v. U. S.,* 178 U. S., 510 (44 L. Ed., 1170); Endlich Inter. Statutes, sec. 4. The rule has been clearly stated by the courts in various forms, but they all are substantially expressed in this formula, that where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms, which excludes the necessity for construction. *Thornley* *v. U. S.*, 113 U. S., 310; *Doe ex dem. Poor v. Considine,* 6 Wal. (U. S.), 458 (18 L. Ed., 869); *Hamilton v. Rathbone,* 175 U. S., 419.

The act of 1913 is not a general law; that is, one having general application, but is "local" and undoubtedly "special" in its nature, and therefore necessarily embraced by the language of the repealing clause of the act of 1919 (sec. 22). We were not informed of any other general, special, or local act relating to this subject, and the act of 1919 as clearly indicates what law was intended to be repealed as if it had referred to it by the year of its enactment and the chapter of the laws of that year where it would be found. But the other provisions of the act of 1919, especially those of sections 8 and 9, lead us to the same conclusion. The language of those sections is so broad in its scope as to show without any doubt that the Legislature intended to abolish all authority of townships over the construction and maintenance of roads and bridges, as well as their repair and reconstruction, and to vest the entire authority with respect thereto in the county, acting through its own highway commission, created by the act of 1919. The language of section 8, upon which plaintiff relies for the position that it was not intended to repeal the act of 1913, as originally framed, or as amended, takes away all of the power and jurisdiction (so to speak) of the township highway commission over roads and lodges it "absolutely and entirely" in the county highway commission, as the act of 1919, repealed altogether, and without any reservation, the law of 1913, it not only completely changed the law as to the control of roads of the township, but relieved the defendants from the duty imposed upon them by the act of 1913, concerning the repair and reconstruction of the particular road mentioned in that act. It follows from these considerations that plaintiff's cause of action, if it had any theretofore, has been lost. There is nothing said in the act of 1919 about repairing the roads of Halifax Township, except as that township is embraced by the general terms of the act. It is not named, by itself, in the act.

The other question, as to the right of the plaintiff to bring this action for a mandamus against the defendants as agents or officers of the State, need not be discussed in view of the conclusion we have reached.

After the full discussion given to this question, it will be unnecessary to consider the evident reasons for this change in legislation concerning the repair of this road leading from the town of Halifax to the former State farm. If the county, or township, feels that the State in some way should compensate it for damage done to this road, on proper application to the Legislature it may get adequate relief, as the State is presumed always to be just, and to perform its moral obligations. It may be moved, though, to deny relief in this particular case, as plaintiff has been guilty of laches, and conditions and circumstances have recently been so materially changed so as to greatly increase the difficulty of doing the work, or some other equity in its favor may exist, which would justify its refusal.

The case having been heard upon complaint and answer alone, it will be certified to the court below that there was error. The judgment will be reversed, and the action dismissed.

Reversed.

J. A. PRITCHARD ET AL. v. D. E. WILLIAMS.

(Filed 9 March, 1921.)

1. Betterments—Evidence—Estates.

When the unsuccessful defendant in an action of ejectment may recover as betterments for improving farm lands in which he had a life estate only, it is competent for him to show that the land had been depleted and remained idle for a period of time, and by his expenditures in a systematic plan of unusual fertilizing, clearing the lands of trees, ditching, building of fences, etc., with a *bona fide* and reasonable belief that he owned the fee, he had brought the land to a high state of cultivation; and it is for the jury to determine whether the land had been substantially and permanently improved thereby, and if so, the added value. C. S., 701.

2. Same—Questions for Jury—Trials.

Where it has been judicially determined, in an action of ejectment, that the defendant is entitled to recover for betterments placed thereon, while *bona fide* believing that he was the owner of the fee, when he was, in fact, a tenant for life, the wishes of the remainderman as to the kind or nature of the improvements, or whether they will be useful to him, is immaterial, the question for the jury to determine upon the evidence being the value of such improvements as were permanent and substantially increased the value of the land, not exceeding the cost.

APPEAL by both parties from *Calvert, J.*, at November Term, 1920, of CAMDEN.

This was an action in ejectment, in which the plaintiff recovered, 175 N. C., 319. A petition was filed for betterments, and in the same case, 176 N. C., 108, the Court held (by *Brown, J.*, for a unanimous Court) that the petitioner (the defendant) was entitled to recover the same. Upon rehearing, 178 N. C., 444, this judgment was reaffirmed. This is an appeal from the verdict and judgment upon the issues submitted, the only points presented being exceptions to the charge on the third issue as to the value of the betterments. Both parties assigned error and appealed.

Meekins & McMullan and D. H. Tillett for plaintiffs.
R. C. Dozier, W. I. Halstead, Aydlett & Simpson, and Ehringhaus & Small for defendant.

PLAINTIFF'S APPEAL.

CLARK, C. J. The court charged that the term "permanent improvements" includes "all improvements of a permanent nature, and which substantially enhanced the value of the property in controversy." The court charged further (the property being a farm) that "putting up dwelling-house or tenant houses, barns and stables, and other out-buildings, and any substantial improvements which might be made to those buildings, the necessary ditching and necessary or proper fencing, the digging of a well or planting of orchards, and cutting the timber in the course of clearing for cultivation, the grubbing of stumps, bushes and reed patches necessary to clear and break the land for planting and cultivation were permanent improvements on such property within the meaning of the statute," adding, however, "that it was for the jury to determine whether or not such improvements, if the jury should find that any were made, enchanced the value of the property, and if so how much, and while the jury should consider substantial additions or improvements to the buildings if made, they should not consider repairs to such buildings which should be made by the owner in the ordinary use of such property." He further charged that ditching (embraced in the plaintiff's first exception), wire fencing (second exception), lightning rods (third exception), dwelling-house, tenant houses, barns and stables, the digging of a well, and the planting of orchards, and the like were permanent improvements only if they substantially enhanced the value of the property. In these instructions we find no error.

The plaintiff's fourth and fifth exceptions were to the refusal of prayers to instruct the jury, which were based upon the idea that since under the terms of the trust established in the main cause, 175 N. C., 319, the plaintiff was decreed to be the owner of the life estate, he occupied the position of a life tenant with respect to the improvements made by him. But he was not an ordinary life tenant within the meaning of the principle that life tenants cannot recover for betterments which were placed thereon with the knowledge of that fact. The defendant made the improvements, as the jury find, under a *bona fide* belief that he was the owner in fee simple, and the court decided that the plaintiff was entitled to have the issue thereon submitted, 176 N. C., 108, by a unanimous Court, and this was reaffirmed on rehearing, 178 N. C., 444. The plaintiff's prayers were therefore properly refused.

Exceptions 6 and 7 to the refusal of prayers cannot be sustained. The defendant's right to recover for betterments does not depend upon the wish of plaintiff for them or the sufficiency of the buildings already upon the land, *R. R. v. McCaskill,* 98 N. C. 526. The sole question, the defendant having placed these improvements upon the land under a *bona fide* belief that he owned the premises in fee simple, is whether or not the things which were put thereon as permanent improvements "substantially enhanced the value of the premises." If so, the defendant was entitled to recover to the extent of such enhancement in value of the property caused thereby, not exceeding the cost. In the plaintiff's appeal there is

No error.

DEFENDANT'S APPEAL

The exceptions on the defendant's appeal present but a single question, and that is, whether the evidence therein offered tending to show a large outlay, and labor in preparing the soil to put it in condition for cultivation, and improving the fertility permanently by the use of a judicious system of tillage and high-grade fertilization over and above the ordinary fertilization of the property from year to year, should be submitted to the jury.

The defendant offered to show as follows: "That the defendant had also adopted and used a system of tillage with an idea of improving permanently the character of the soil and increasing its fertility, and that he had judiciously applied this system to the cultivation of this land; that he had burned and placed upon the land 8,000 bushels of oyster shells, burned into lime; that he had placed twenty loads of manure upon the lands the first year, besides that which came from the place; that he had placed upon these reclaimed acres 200 loads of manure a year in addition to the ordinary accumulation on the farm; that he had purchased and placed on it in addition to this an entire barge load of manure; that he had also placed upon the land 1,000 bushels of hard-wood ashes each year, for nine years, same having been taken from his mill, which was located in the neighborhood; that he had sowed the land with peas and clover and plowed them in for the purpose of increasing its fertility; that he had in his system of tillage adopted a judicious system in the rotation of crops and deep plowing peculiarly adapted to this soil, for the purpose of increasing its fertility; that in addition to the 8,000 bushels of oyster shells burned into lime, the defendant had placed on the land two carloads of agricultural lime of about 100 tons; that this was all in addition to the fertilizers used each year for the tillage of the crops, and for which no claim is made; that in following this line of effort to improve the soil the defendant had made a cash outlay in excess of $4,230.18, and that in his opinion such efforts had enhanced the value of the property to this amount."

Whether the above were applied, and whether they substantially enhanced the value of the farm, was fit for the jury to consider, and we think it was error to exclude the testimony offered.

This evidence tends to show an unusual and successful effort by which a run-down farm of about 143 acres, which had lain idle for almost a generation, had been brought into a high state of cultivation, and made, as the defendant contends upon the evidence, to "blossom like a rose." The mere cultivation of the soil in the ordinary use of the land and fertilization thereof for the purpose of raising crops in the ordinary course of tillage certainly would not constitute betterments. Only those things which substantially enhance the value of the premises permanently should be estimated by the jury and allowed to the defendant as compensation.

The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the Century Dictionary as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like, and it was held in *Simpson v. Robinson,* 37 Ark., 132, that an improvement does not mean a general enhancement in value from the occupant's operations.

It is elemental justice, as well as public policy, when a man occupies premises, "having reason to believe," C. S., 701, that he is owner thereof in fee simple, that to whatever extent he has increased the value of the property by permanent improvements thereon he should receive compensation from the party who recovers the premises.

The cultivation of the soil in a good and proper manner, and the keeping of the buildings in repair and the land in good condition does not entitle the defendant to recover compensation, but permanent improvements by clearing the land, ditching, fencing, and likewise high fertilization of permanent effect (over and above the ordinary fertilization for the purpose of making the crops), causing enhancement in the value of the farm—all these things are properly for the consideration of the jury, who should find what is a fair allowance for the permanent enhancement in value of the property thereby at the time of the recovery of the premises by the plaintiff.

But it is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether any of these things have added permanent enhanced value to the realty. If a building is placed upon the premises it will gradually decay; if ditches, fencing, or other betterments are made they will gradually deteriorate, if not kept up. "Permanent" improvements mean such betterments as will add to the intrinsic value of the property at the time it was recovered by the plaintiff whether there has been, in this case, unusually high fertilization of the land, or the addition to the soil of vegetable or mineral matter whereby the property has been permanentily enhanced in value, when there is evidence offered to that effect, is for the jury to determine in estimating the benefit which the plaintiff derived therefrom. In the course of time, by negligence, the buildings may deteriorate, and the enhanced production of the land may grow less, but the jury is to estimate what is the permanent added value to the premises at the time the plaintiff recovered the property. The difficulty is not in the principles of law applicable but as to matters of fact arising upon the evidence and which were for the jury to weigh and determine and which can never be exactly the same in any two cases. If unsuitable buildings are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the ditching and fencing were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff, *R. R. v. McCaskill,* 98 N. C., 526.

The sole matter for consideration is embraced in one proposition, and that is, "How much was the value of the *property* permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the *bona fide* holder of the same?"

The matter is fully discussed and clearly set out in *Gibson v. Fields* (79 Kansas, 38), 17 Anno. Cas., 406, in the elaborate notes thereto appended.

Certain acts which amidst certain surroundings and conditions might enhance the property permanently, in other surroundings and conditions would add nothing to its permanent value. These are ordinarily matters for the jury, and no general rule can be laid down more definite than that above stated. In the defendant's appeal there was

Error.

STACY, J., concurring.

WALKER, J., dissenting. In 1907 defendant Williams received a deed for the lands in controversy from Mrs. Mary and Miss Mary Elizabeth Hughes, purporting to convey a fee simple. Defendant thereupon entered into possession of the lands, which he still occupies. In the main action this Court held that the plaintiff was entitled to recover the lands under the parol trust established. Under this trust it is admitted that the defendant took from the Hugheses a life estate, and the plaintiffs, in consequence, were not entitled to offset rents for the period running from 1907 to 15 May, 1915, inclusive, as against defendant's claim for betterments. At the time of the execution of the deed from the Hugheses to the defendant, Miss Mary Elizabeth Hughes was forty-four years of age, having an expectancy of twenty-five years. Upon rendition of the judgment in the main action, defendant filed this petition, claiming compensation for alleged permanent improvements made from 1907 to 1918, inclusive, defendant being still in the possession of the land by the order of the court. At the trial it was admitted that the enhanced value of the land should be estimated as of 15 May, 1915, the date of Miss Mary Elizabeth Hughes' death.

Defendant upon the trial offered to show the expense incurred in breaking soil preparatory to putting the land in cultivation, and that it was necessary to put it in cultivation. This testimony was excluded, and defendant excepted. In this connection, it is to be observed that at the time the defendant took possession of this land it was all open land, which had theretofore been in cultivation and which had only been permitted to "lie out" for a number of years in accordance with the well known practice of farmers, in order to restore fertility. In no view of the evidence was it wild land or prairie land, which had never before been subject to cultivation.

The court permitted the defendant to offer evidence to show the cost of clearing this land; that is to say, the cost of cutting the trees upon the hedgerows, clearing hedges, the grubbing of stumps, and the taking out of reed patches, and further to show the enhanced value resulting from such improvements to the land; and that the only testimony rejected was that to show the alleged cost of breaking the land; that is to say, when regarded in connection with the evidence received, the doing of necessary plowing to enable the land to be planted and cultivated.

The law which is, perhaps, applicable to wild or prairie lands, has no relevancy here. These lands had been in cultivation, but their fertility, perhaps, had at one time been exhausted, and they had been permitted to "lie out," or remain fallow or uncultivated for one or more years, until they could by proper tillage and fertilization be made to yield a remunerative crop.

The doctrine of permanent improvements in cases of this kind is based upon the theory that one acting under a *bona fide* belief that he has the true title has done something the main purpose of which is to render the land more valuable; and does not include those things which, while they may have an incidental tendency to increase the value of the freehold, are yet done with the main purpose of increasing the current years revenue by producing a larger crop.

The defendant in this case was a life tenant, and he enriched the land, primarily at least, for his own benefit, that is, for the better enjoyment of the land by himself, and, even if there was a temporary enhancement of its value, it was purely incidental, and was not permanent in any correct sense of that word, as will presently be seen.

In any event, defendant, by the restriction of the statute, could not recover more than the amount actually expended by him in making the improvements, and plaintiffs asked for an instruction to this effect, which was refused. Consol. Statutes of 1919, sec. 701.

The second exception is based upon his Honor's exclusion of testimony tending to support the item in defendant's bill of particulars, entitled, "Improvement to soil, 1907 to 1918." In support of this claim defendant offered to show that by a system of rotating crops, and of plowing, and by the use upon this land of large quantities of stable manure, ashes, and lime, he had permanently improved it. The testimony was properly excluded, as the law does not consider fertilization of the soil as constituting a permanent improvement. *Crummey v. Bentley,* 114 Ga., 746; *Effinger v. Kenney,* 92 Va., 245; *Wright v. Johnson,* 108 Va., 855. It may be admitted, for sake of argument, that where lands are judiciously cultivated and properly fertilized by a tenant for life or years, they may be more valuable at the end of the tenancy than if they had been subjected to a haphazard or injurious use, but the improvement is not of that lasting character as is contemplated by the betterment statute. It is further true, however, that it is the duty which such a tenant owes either to his landlord, or to the reversioner, to cultivate the lands judiciously, and that the main purpose of such method of cultivation, and of proper fertilization also, is to increase the present tenant's revenues by the greater crop yield during his term. It may be, and perhaps is, quite true that the effect of manure and lime upon land is more enduring than that of the ordinary commercial fertilizer—the latter being used mainly because the former is not readily obtainable; but the effect of all these is nevertheless temporary, lasting by common knowledge not more than two or three years, the ordinary commercial fertilizer being supposed to exhaust itself in about one year's time. The use of manure and lime is, in a word, fertilization—a better class of fertilization it may be, but nevertheless only fertilization. It is to be remembered, also, in this connection, that at the time this land was fertilized by the defendant, he owned a life estate, the expectancy whereof was twenty-five years, and which in fact endured for nine years, during all of which the defendant occupied the land rent free, and it would be strange justice if the defendant, who has so occupied the land during this period, could recover for fertilization and judicious tillage during the period of his own life tenancy, when he was holding the lands for his own exclusive benefit.

Another reason why the testimony was properly excluded is that the defendant offered to show such fertilization and such tillage from 1907 to 1918, inclusive, together with the added value thereof to the land. Even assuming that these acts of defendant constituted permanent improvements, the defendant still could not recover for such improvements after the institution of this action in November, 1916, when he acquired full knowledge of the facts. It was the duty of the defendant, therefore, in offering this testimony, to restrict the same to the improvements claimed, and the enhanced value of the land therefrom to the period for which defendant was entitled to recover for such enhancement. And the defendant, having failed to do so, and having included in his offered testimony as well the claim for improvements made after suit brought as those made before suit was brought, the testimony was properly rejected.

Reverting to the principal question, as to whether defendant could be allowed anything for cultivation, fertilization, tillage, etc., we find that the authorities are to the effect that he cannot have such remuneration, because these improvements are not of a permanent character. The Court said, in *Cumming v. Bentley, supra:* "Another item consisted of a claim for improvement to the land by reason of fertilization. The court held that the defendants were not entitled to any allowance upon these claims; and we are of the opinion that, even giving to the act in question its widest possible scope and operation, the views entertained by the trial judge were undoubtedly sound." See, also, *Effinger v. Kenney, supra,* and *Wright v. Johnson, supra.*

ALLEN, J., concurring in the dissent.

JOHN HUTCHINSON ET AL. v. W. N. LUCAS ET AL.

(Filed 9 March, 1921.)

Estates—Wills—Defeasible Fee—Deeds and Conveyances—Estoppel.

A devise to the testator's son, A., and should he die without issue, then the lands devised to him to be equally divided among the testator's children or their issue living at the death of A.: *Held,* the estate devised to A. is a defeasible fee, and should A. die without issue the estate would vest in his brothers and sisters living at the time of his death, and such of their children as may then be alive, in fee, as coming from the testator direct. And the death of A. not having been shown the contrary is presumed, and a deed from his brothers and sisters cannot convey an indefeasible fee simple title to a purchaser, or estop their own children or claimants, the children of those who are deceased.

APPEAL by plaintiffs from *Cranmer, J.,* at November Term, 1920, of WILSON.

Iredell Farmer devised the lands in controversy to his youngest son, Arthur D. Farmer, with the following condition:

"If my said son, Arthur D. Farmer, shall die without leaving issue, on his death it is my will and desire that all the lands devised in this will shall go to and be equally divided among my children or their issue living at his death, and to their heirs forever."

It is not alleged that Arthur is dead, and the answer avers that he was in Wilson in 1918. The estate devised to Arthur was conveyed by an order of court, and thereafter, in 1900, W. T. Farmer, Joshua L. Farmer, and Mary J. Farmer, the brothers and sister of Arthur, and the only other children of the testator, Iredell Farmer, executed a deed and quitclaim for all their right, title, and interest in the lands in controversy. Joshua L. Farmer, one of the brothers of Arthur, is dead, leaving a widow and five children.

The plaintiffs moved for judgment on the pleadings, but the court refused on the ground that they could not convey an indefeasible title, and dismissed this action, which was brought to compel the defendants to pay the purchase money upon the tendering of a deed therefor upon a contract of sale. The plaintiffs appealed.

James S. Manning for plaintiffs.
J. C. Biggs for defendants.

CLARK, C. J. The plaintiffs concede that the estate devised to Arthur is a defeasible fee, but they contend that the quitclaim executed by the brothers and sister of Arthur estopped their issue, and they rely upon *Cherry v. Cherry,* 179 N. C., 4. The devise in that case is different from this.

In the present case it is provided that upon the death of Arthur Farmer without leaving issue the land shall go to and be equally divided among the testator's children, *"or their issue living at Arthur's death,"* and their heirs forever. If one or more of the children of the testator should not be living at Arthur death, then "their issue," that is, the children or grandchildren of the testator's deceased children, living at that time, would take the share that otherwise would have gone to their deceased parent, for it cannot be known until the death of Arthur who will be living at his death. It does not appear that he is dead, and the presumption is that he is still living. One of his brothers is already dead, and if Arthur should die without leaving issue, at his death any children of the deceased brother who may be living at that time would take an interest under the will, and the deed of their father would not estop them, because they do not claim under him, but the title passes to his issue directly from the testator to them. *Benson v. Benson,* 180 N. C., 106; *Burden v. Lipsitz,* 166 N. C., 523; *Whitfield v. Garris,* 134 N. C., 24.

Though when the holders of a contingent estate are specified and known they may assign and convey it, and can make a deed which will conclude all claiming under them, *Hobgood v. Hobgood,* 169 N. C., 485, yet "where the heirs, issue, or children are so designated as to take by purchase under the terms of the will, there is no estoppel or rebuttal, as they do not take from their ancestor by descent, but directly from the devisor as purchasers." *Malloy v. Acheson,* 179 N. C., 95. This was fully discussed and is so held in *Whitesides v. Cooper,* 115 N. C., 570, which has been repeatedly cited since. See citations in Anno. Ed.

The plaintiffs rely upon *Cherry v. Cherry,* 179 N. C., 4, but in that case the provision was that upon failure of the first takers the land should go to the testator's three sons absolutely, and the Court held that the additional words in that devise "to be equally divided between them or among their heirs *per stirpes* and not *per capita*" did not prevent the estate from vesting absolutely in the sons, and hence they would be estopped, and their heirs also, by any conveyance of their vested contingent interest. In the present case the words "or their issue living at their death" can be construed only as meaning that the testator intended that upon the death of Arthur, without leaving issue, the land should go to and be equally divided between his other children, if living, or if they were not living, then their issue *living at that time* should take. The added words at the end, "and their heirs forever," show that the testator intended to give the remainder in fee to his other children, or the issue of any deceased children who might be living at the time of the death of Arthur, if he died without leaving issue. The intent of the testator was that if his other children were living at Arthur's death, he leaving no issue, they should get the remainder, but that if any of his children were dead at that time their issue, if living at that time, would get the share of the deceased child.

The plaintiffs rely upon *Hobgood v. Hobgood,* 169 N. C., 489, and *Bourne v. Farrar,* 180 N. C., 135, which hold that when those who shall take a contingent interest are certain, by uniting with the owners of the preceding estate, they can pass a good title, "but when the owners of the contingent interest cannot be ascertained until the determination of the preceding estate, an indefeasible title cannot be made until then." *Whichard v. Craft,* 175 N. C., 128, in which case *Allen, J.,* in a very brief opinion, points out tersely but clearly the distinction between the two classes of cases.

The words in this devise, "or to their issue living at his (Arthur's) death," brings this case under the ruling of *Burden v. Lipsitz, supra,* and that class of cases. In *Smith v. Lumber Co.,* 155 N. C., 389, which is very much in point, the court held that where the vesting of the contingent interest is determined by the death of the children named and not upon the death of the testator, each of the children takes a contingent remainder, but if they die before the death of the owner of the defeasible fee (leaving no issue), then the grandchildren, or issue of the children, take as purchasers under the will and not under the children of the testator, and hence will not be estopped by any conveyance or quitclaim of their ancestor.

The doctrine so clearly stated in *Whitesides v. Cooper,* 115 N. C., 570, has been often approved, among other cases by *Thompson v. Humphrey,* 179 N. C., 52; *Williams v. Biggs,* 176 N. C., 50.

Affirmed.

DULCEDO SMITH v. JOSEPH J. ALLEN, ADMR.

(Filed 9 March, 1921.)

1. **Limitation of Actions—Pleadings—Appeal and Error.**

In an action against the administrator of the deceased where there are two separate causes of action set out, one to recover the value of services rendered the intestate by the plaintiff, and the other to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations as to the second cause of action in order to avail himself of it as a bar to the plaintiff's recovery thereon.

2. **Limitation of Actions—Contracts—Wills.**

The statute of limitations does not begin to run until the death of the intestate on his contract with the plaintiff, that if plaintiff performed certain services for him during his life he would compensate him therefor in his will.

3. **Appeal and Error—Harmless Error—Evidence—Deceased Persons—Statutes.**

The admission of evidence concerning transactions or communications with deceased persons, forbidden by our statute, is, at least, harmless error when both parties to the action have testified to them, without objection, and the objection upon which the exception is based, was subsequently taken.

APPEAL from *Lyon, J.*, at the September Term, 1920, of WARREN.

This is an action to recover for personal services rendered by the plaintiff to the intestate of the defendant, and certain taxes paid by the plaintiff.

There was evidence tending to prove that plaintiff, a nephew of defendant's intestate, lived alone with the intestate for about fifteen years, until intestate's death, 25 July, 1919, at the advanced age of 89 years; that for the last seven years of this time the intestate was bedridden; and for the last three years he was totally helpless, having no control of his body, his limbs, his bladder, or his bowels; that plaintiff waited on him, cleaned him, made his fires, sat up with him, changed his bed, brought his meals, and attended to his business. The intestate was in mature life, a man of business, but came back to his farm near Manson when past 70, and told plaintiff that if plaintiff would stay there with him and take care of him and attend to his business as long as he lived he would give plaintiff the place, about 500 acres of land, uncultivated, growing up in pines. Deceased also stated several times that he had made a will giving plaintiff the place. It was shown that he refused to pay the taxes, saying it was plaintiff's, and plaintiff must pay them; and that plaintiff paid the taxes from 1906 to his uncle's death. When people would ask leave to hunt or to buy trees, deceased would say, "See Dulce; it is his"; or words to that effect.

After his death no will was found, and this action was brought to recover the value of plaintiff's services.

The timber on the land was sold in the spring of 1920 by the heirs for $37,000. The land itself was worth six or seven thousand more, and deceased had in bank $3,000, which was not diminished during his long illness.

Jarvis Allen, a colored man, born on the place, helped to nurse deceased, and being refused payment, sued for $2,000, and was paid $1,250 without a trial.

Plaintiff, a dentist, a man of education, demanded $5 per day for his services for the seven years during which the deceased was helpless, alleging the contract, the performance thereof by him, and the breach thereof by the death of the intestate without payment or provision for plaintiff.

Plaintiff also added a cause of action for the taxes paid by him, and interest thereon.

The defendant denied liability, and pleaded the statute as to all but three years of the services; but did not plead the statute against the claim for taxes.

The jury returned the following verdict:

"1. Did O. G. R. Smith agree with plaintiff that if the plaintiff would remain with him at his home and care for him and look after his business, and that if he, the said plaintiff, would do so, he, the said O. G. R. Smith, would at his death compensate him for his services and attentions? Answer: 'Yes.'

"2. Did the plaintiff remain with the said O. G. R. Smith at his home and care for him and look after his business, as alleged in the complaint? Answer: 'Yes.'

"3. Did the said O. G. R. Smith, at his death, compensate the plaintiff for the services and attentions of the said plaintiff to him which were rendered as alleged in the complaint? Answer: 'No.'

"4. What sum, if any, is the plaintiff entitled to recover for such attention and service? Answer: $12,783.75."

"5. What sum, if any, is the plaintiff entitled to recover for the taxes paid by the plaintiff for the said O. G. R. Smith? Answer: '$574.66.' "

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed, assigning the following errors:

"1. Exception is to the court permitting plaintiff to testify what he did for the intestate.

"2. Exception is to testimony as to taxes paid for deceased for more than three years before his death.

"3. Exception is to the charge of the court on the 4th issue refusing to hold that the claim of plaintiff is barred as to all arising more than three years before intestate's death.

"4. Exception is to refusal to charge that all taxes paid more than three years before intestate's death are barred of recovery by the statute of limitations.

"5 and 6. Exceptions to the verdict and judgment, respectively."

T. T. Hicks & Son, Daniel & Daniel, B. B. Williams, and W. P. Harvey for plaintiff.

Tasker Polk, William H. and Thomas W. Ruffin, and A. C. and J. P. Zollicoffer for defendant.

ALLEN, J. The second, third, and fourth exceptions may be considered together, and the fifth and sixth are purely formal.

The second and fourth are to the refusal to hold that the claim for taxes paid more than three years prior to the death of the intestate is barred by the statute of limitations, and it is a complete answer to these exceptions that the claim for taxes was alleged as a separate and distinct cause of action and that the defendant did not plead the statute of limitations to this claim.

The third exception is answered by the finding of the jury upon the first issue, it being well settled in this State, "That where services are rendered upon an agreement that compensation is to be made at death, that the amount does not become due until death, and that the statute of limitations does not begin until that time." *Helsabeck v. Doub*, 167 N. C., 206.

The evidence is ample to sustain this finding, and there is no exception by the defendant to the contrary.

The defendant did not ask the court to hold, nor did he request a prayer for instruction, that there was no evidence to support the finding upon any of the issues.

The first exception is to permitting the plaintiff to testify that he would have to be up with intestate "at night, every night, anywhere from two to ten times, to move him, lift him, and change his position. He could not move himself after 1916. Nobody stayed with him at night but me. On August, 1912, to July, 1919, I could have easily earned from $8 to $10 per day. I paid taxes on that land from 1906 until the old man died."

This objection to evidence was upon the ground that the plaintiff was a party and that it involved a transaction with the deceased.

It will be seen, however, that the plaintiff had already testified without objection to all of those facts and that afterwards on cross-examination the defendant examined him minutely covering every phase of the answer objected to, and further that the administrator was examined as a witness and testified as to these transactions.

If, therefore, the objection could have been sustained, in the first instance, the evidence is harmless because the same facts were testified to by the same witness without objection and the administrator having testified as to the transactions the plaintiff would be permitted to do so.

We have examined the record carefully and it appears to us that the verdict is right and that the claim of the plaintiff is meritorious, and has been established in accordance with law.

No error.

L. H. ROBERSON v. W. G. STOKES AND W. F. STOKES.

(Filed 9 March, 1921.)

1. **Instructions—Evidence—Assault—Damages—Appeal and Error.**

In an action to recover damages for an assault, where the evidence is conflicting as to which of the parties were in the wrong, it is reversible error for the trial judge to charge the jury upon the assumption that the version of one of them was the correct one, leaving out the contention of the other party and failing to instruct thereon.

2. **Instructions—Assault—Damages—Father and Son—Intervention of Son—Questions for Jury.**

While a son may, under certain circumstances, come to the aid of his father, who is being assaulted, he is not justified in using such excessive violence as his father is not permitted to use in his own defense; and where the evidence is conflicting as to whether the father was in the wrong throughout the fight, and that he started it and was the aggressor, it is for the jury to find the facts, including the necessity of intervention by the son, and whether he kept within his privilege, and it is reversible error for the trial judge to present this question hypothetically, which assumes the facts adversely to the appellant.

3. **Evidence—Father and Son—Assault—Intervention of Son—Motive—Appeal and Error—Objections and Exceptions.**

In a civil action to recover damages for an assault, where there is evidence that the plaintiff's son went to the assistance of his father, evidence is competent which tends to show the son's motive in doing so, but it should be properly confined thereto, and its admission as to other matters tending to prejudice the defense, is erroneous.

4. **Evidence—Competent in Part—Appeal and Error—Objections and Exceptions.**
   Where the evidence at the trial is partly competent, an objection thereto must specify the ground upon which it is incompetent, or the complaining party must ask the judge to restrict it within its proper limits, or it will not be passed upon on appeal.

5. **Evidence—Burden of Proof—Admissions.**
   Where, in an action for damages for an injury received in an assault, the defendant admits that he had assaulted the plaintiff, and pleads and introduces evidence to show justification, the admission shifts the burden of proof to him.

APPEAL by plaintiff from *Bond, J.*, at September Term, 1920, of PITT.

Plaintiff alleged that he and W. G. Stokes, father of the other defendant, had some disagreement about a telephone, W. G. Stokes seeming to be very much "wrought up" about it. That they got into a heated controversy. Plaintiff testified: "I told him to keep his mouth out of my business; he then stepped over to a pile of bricks, and I shoved him on them; about that time I saw his son, W. F. Stokes, coming with a brick in each hand, and I knew they had me foul. The boy threw one brick at me, which went over my head, but the next one hit me, and I spinned around, wrenched my ankle, and fell; before I could recover and get up, W. G. Stokes jumped astraddle of me and hit me with a brick. I did not know anything else; some boys took me up. When I recovered I found W. G. Stokes standing over me. As a result of the wound I went to the hospital; Dr. Basnight phoned Dr. Taylor, and he took me to the hospital. I think I was in the hospital about ten days. I was totally unable to do anything for about thirty days." Plaintiff further testified that afterwards his ability to labor was considerably impaired, and that he suffered pains in his head, whereas, before he received the blow, he could do any kind of hard work. This testimony is stated first to show the serious character of the assault upon him, and secondly, the wide difference between the parties in their several versions of the facts.

The defendants denied the truth of the plaintiff's testimony, and W. G. Stokes stated, on the contrary, that he and plaintiff had an altercation and plaintiff cursed him. He then said: "I had nothing to defend myself with, and I knew he was dangerous. I walked to a pile of brick and he jumped on me. It was all so quick I hardly knew what had happened, but I heard my son say, 'Get off of papa.' I did not touch him a lick. I was as far as from here to Colonel James from the brick, and had no brick. At the time he jumped on me I was not trying to strike him. He jumped on me and threw me down. I turned him over, but did not hit him. In the trial before I understood that William hit him. . . . The scuffle lasted about one minute and a half. I won't tell the jury whether he was struck in the face while he was standing up or while he was on me. I was able to turn him over. I am sure he was hit while he was on me, because I was able to turn him over. I stood over him until the people came there and took him away. They all came right over there. I was straddle of him, but I did not offer to hit him; I had nothing to hit him with. I never had a fight in my life. Have never been in court. He did not hit me with a brick. He would have killed me if William had not come to me in time. My son saved my life; he is a heavy man; I am no fighter myself."

W. F. Stokes testified: "I noticed Roberson coming toward my father. He was cursing, and I realized that my father was in danger, and I thought it was my duty to protect him. Roberson had my father down and running toward him I picked up a brick and threw it at him as a warning, but he did not get off. By that time Roberson was on the bottom and my father was on top. I had two bricks in my hand and I threw both of them. Roberson was on my father when I threw the first and second brick. They were about 10 or 15 feet from the pile of brick. I did not see my father have any brick in his hand. There was no brick within his reach. I threw the first brick as a warning and it went over his head. I knew that the second brick that I threw hit him. It hit him on the head. Then my father turned him over. At the time I threw the second brick I thought it was necessary to save my father's life. I knew it was a matter of life and death. I have known Mr. Roberson all of his life."

The court gave the jury this instruction, to which the plaintiff excepted: "If I go out there today, when one of you has done nothing to cause trouble, and knock you down, and your son sees me with you down, the law says your son has a right to protect you from serious bodily harm at my hands." This instruction was given after his Honor had read from Wharton on Homicide (3 ed.), at bottom of page 775, on the right of a son to defend his father.

The judge also charged that the burden as to both issues was upon the plaintiff, when the defendant, W. F. Stokes, admitted that he had struck the plaintiff with the brick, or that he had hurled the brick at him, "hitting the mark exactly."

The verdict was against the plaintiff as to all the issues, and from the judgment thereon he appealed.

Julius Brown for plaintiff.
F. G. James & Son for defendants.

WALKER, J., after stating the case: There are twenty-seven assignments of error, but we need refer to only two of them, though there may be others worthy of serious consideration, as strongly contended by the plaintiff's counsel; but we must not be taken as intimating that there was any error except in the respect now indicated by us.

It was erroneous to charge the jury as set forth in the above statement of the case for two reasons: 1. It was based upon the assumption that defendants' version of the assault was the correct one, whereas there was evidence that defendants were in the wrong throughout, and the jury, therefore, had the law stated to them with only a partial and contracted view of the evidence. This method of charging a jury has been disapproved by us. Where a phase of the evidence is presented to the jury, both contentions in regard to it should be given, otherwise it might cause the jury to give undue weight and significance to the one stated. The very question was discussed in *Jarrett v. Trunk Co.,* 144 N. C., 299, where it was said that although it be not error generally to refrain from giving instructions unless asked to do so, yet care must be taken when the judge thinks proper to instruct the jury upon a phase of the evidence and to expound the law in relation thereto, not only to state it correctly, but to state the law as applicable to the respective contentions of each party upon such phase of the evidence. Having undertaken to tell the jury how they should answer that issue if they found such facts according to plaintiff's contention it was manifestly incumbent upon the court to state the defendant's contentions in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention. *S. v. Austin,* 79 N. C., 626; *Burton v. R. R.,* 84 N. C., 197; *Bynum v. Bynum,* 33 N. C., 636; *S. v. Wolf,* 122 N. C., 1081. The phase mentioned by his Honor was flatly denied by the plaintiff, and a very different complexion given to it by him. The judge's illustration, based, as it was, on the assumption that plaintiff was the sole aggressor, and that W. G. Stokes did nothing to bring on the fight, but was illegally assaulted by the plaintiff and knocked down, was not justified by the evidence, as there was plenty of evidence to show that it was not true, but that the defendants were the aggressors, W. G. Stokes having attempted to attack the plaintiff with a brick, and that the latter acted in self-defense, and that the other defendant wrongfully and unlawfully joined in the attack upon him, having no just or legal ground for his intervention, which was simply voluntary and gratuitous on his part. It was therefore required, under the principle stated in *Jarrett v. Trunk Co., supra,* and the cases therein cited, that the judge should have stated both sides of the evidence bearing on that particular phase. Such an instruction was peculiarly required, under the circumstances of this case, and the incompleteness of the one given, in the respect indicated, may have turned the scales against the plaintiff, and probably did. What the judge did say afterwards was not sufficient to cure the error. The instruction also was too broad, because it leaves out of consideration the necessity for the interference of the son, which is a question for the jury, and apparently omits any reference to excessive force. It was held in *S. v. Johnson,* 75 N. C., 174: "The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of the master, and reciprocally; but the act of the assistant must have the same construction in such cases as the act of the assisted party should have had if it had been done by himself; for they are in a mutual relation one to another. Although the law respects the human passions, yet it does not allow this interference as an indulgence of revenge, but merely to prevent injury. The son, therefore, is allowed to fight only in the *necessary defense* of the father; and to excuse himself he must plead and show that Shipwash would have beaten his father had not he interfered. 3 Bl., 3, and note; 1 Hale Pl. Cr., 484; Bac. Ab., Master and Servant, P. There was evidence in the case that the father and Shipwash were engaged in a fight upon equal terms, and it not appearing which was the aggressor, the law presumes that they were fighting by mutual consent, and were both guilty. The son, therefore, had no right to make the assault." This question is fully discussed by *Justice Allen* in *S. v. Greer,* 162 N. C., at p. 649, and quoting from Wharton on Homicide, sec. 521, he says: "The general rule, as ordinarily stated, is that a brother or other relative assisting another in resisting a wrongful act directed against the latter can use no more force than the person he assists would be entitled to use, and that interference to protect a relative is not justified where the relative was the aggressor in the original difficulty. A person has a right to use violence in defense of another only when the imperiled person would have been justified in using it in his own defense. Both must have been free from fault in bringing on the difficulty." And further, *Stanly v. Com.,* 9 Am. St. Rep. (Ky.), 306, is quoted as follows: "Not only, however, may he do this, but another may do it for him. This other person, in such a case, steps into the place of the assailed, and there attaches to him not only the rights, but also the responsibilities of the one whose cause he espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault." The son could do only what his father could rightfully do, and must be judged by his rights and responsibilities, "because," as Hale said, "they are in a mutual relation one to another." The jury must find the facts, including the necessity of intervention by the son, and whether he kept within his privilege. This instruction stated the question hypothetically, which is forbidden. There was evidence that the father not only entered into the fight willingly, which made it an affray in the best view for him and the son, but that he started the fight, and was the aggressor. It has been said by us that hypothetical instructions should not be indulged in, as they proceeded upon the assumption of facts. *S. v. Collins,* 30 N. C., 407; *S. v. Benton,* 19 N. C., 196; *Johnson v. Bell,* 74 N. C., 355.

As to the defendant W. G. Stokes, we need not discuss any of the other exceptions, but we will briefly refer to one piece of evidence. W. F. Stokes was permitted to testify that he went to assist his father, because he heard of threats made by plaintiff, and also knew of them. The testimony was competent to show his motive, or reason, for going to the place, when the affray occurred, but it should have been confined within its proper limits, and to the only purpose for which it was evidently offered, as otherwise it may have prejudiced the plaintiff upon the defendants' pleas of self-defense. Ordinarily, when evidence is competent for one purpose, but not for another, the party objecting should make his objection special, directing it to the incompetent part of the question, or of the answer, as the case may be. It seems here to have been offered only for a competent purpose, and it does not appear that it was otherwise used. We will have to apply Rule 27 of this Court (164 N. C., 438), requiring counsel who objects to evidence which is competent for one purpose but not for another, to specify the ground of his objection, or to ask the judge to restrict it within its proper limits.

As to the defendant W. F. Stokes, we are of the opinion that the judge erred in stating that the burden of proof was upon the plaintiff, as W. F. Stokes admitted that he assaulted the plaintiff, and this admission shifted the burden to him.

We therefore conclude that there should be a new trial as to both defendants for the errors stated by us, and for that reason the verdict will be set aside, and the case will proceed further in the court below according to law.

New trial.

B. E. HAGOOD v. J. C. HOLLAND ET AL.

(Filed 9 March, 1921.)

1. **Principal and Agent—Contracts—Revocation—Evidence—Issues—Appeal and Error.**

A contract of agency for the sale of land for an indefinite and unstated time may be revoked at will by the owner, in the absence of agreement or covenant to the contrary, and in the agent's action to recover damages for the owner's breach, it is reversible error for the judge to refuse to submit an issue thereon, tendered by the plaintiff, when there is evidence thereof. *Real Estate Co. v. Sasser,* 179 N. C., 497, cited as controlling.

2. Same—Damages.

Evidence that the agent for the sale of lands has bought the interest of of his copartner in the contract of agency, for a certin sum, is incompetent in the agent's action against the owner on the question of damages arising from the exercise by the owner of his right of revocation.

APPEAL by defendants from *Bond, J.*, at November Term, 1920, of CRAVEN.

Civil action, brought to recover damages for an alleged breach of contract, the material parts of which were as follows:

26 August, 1919.

I have employed Hagood-Grantham Real Estate Company to sell for us our farm situate in the county of Jones, State of North Carolina, to wit: (here appeared description of property), at the price of $20,000 net, on the following terms: One-third cash, balance three years, 6 per cent interest, if the same is sold by 1 January, 1920. Said Hagood-Grantham Real Estate Company to pay all costs of advertising they may choose to do.

This 26 August, 1919. (Signed) MRS. L. E. HOLLAND.
J. C. HOLLAND.

Witness:
J. C. SINGLETON,
217 Castle Street, Wilmington, N. C.

On the back of this agreement is the following indorsement:

Mr. Hagood & Grantham, we must have $500 by the first of November to confirm the trade; if not, the within agreement is null and void. We have to do this in case you do not sell, so as to give us time to rent out for another year, 1920. J. C. HOLLAND.

Defendants admitted the execution of said contract; but contended, and offered evidence tending to show, that the same was revoked on 3 October, 1919. The defendants tendered an issue upon the question of revocation, which the court declined to submit. Exception duly noted.

On the issue of damages, plaintiff was permitted to testify, over objection, that when the partnership firm of Hagood-Grantham Real Estate Company, composed of B. E. Hagood and L. T. Grantham, was dissolved, plaintiff paid his copartner $1,000 for his interest in the contract sued on in this action.

Upon issues joined, there was a verdict and judgment in favor of the plaintiff. Defendants appealed.

Moore & Dunn for plaintiff.
L. Clayton Grant and Ward & Ward for defendants.

STACY, J. Under authority of *Abbott v. Hunt*, 129 N. C., 403, and *Real Estate Co. v. Sasser*, 179 N. C., 497, we think his Honor should have submitted to the jury an issue on the defendant's alleged revocation of the contract. The *Sasser case* is on all-fours with the case at bar—the two being identical in principle—and what is said there need not be repeated here. We consider the above cases controlling authorities.

We think the court also erred in permitting the plaintiff to testify to the effect that he had paid his copartner the sum of $1,000 for his interest in the contract. In no event could this be considered as a proper item in assessing the plaintiff's damages. It was not money expended in an effort to secure a purchaser; nor was it any loss of profits within the rule applicable to such loss. Plaintiff purchased the entire contract subject to the defendants' right of revocation; and such a purchase was not within the contemplation of the parties at the time of its execution. This would take the amount thus expended out of the category of recoverable damages.

The remaining exceptions need not be considered, as the questions presented by them may not arise upon another hearing.

New trial.

LACY CROWELL v. W. J. CROWELL.

(Filed 9 March, 1921.)

Rehearing—Petition—Reasoning—Husband and Wife—Venereal Disease—Assault.

The reasons for denying a petition to rehear in the Supreme Court are not usually set out. STACY, J., in denying this petition states his own opinion as to why the petition should be denied owing to the wide difference of opinion of the bench and bar as to whether the wife's action may be maintained against her husband for willfully and deliberately infecting her with a loathsome disease.

PETITION to rehear this case, reported in 180 N. C., 516.

T. A. Adams for petitioner.

STACY, J. Defendant's petition to rehear, filed in this cause, was referred to the writer, under Rule 53 of the Court. It is not customary to assign any reasons for denying a petition to rehear; but, on account of the mooted questions involved and the wide difference of opinion among members of the bench and bar, I deem it not amiss to insert this memorandum in the record as an expression of my individual views.

It will be remembered that plaintiff, a married woman, brings this action against her husband, alleging that he wrongfully and recklessly infected her with a loathsome disease. It is conceded that prior to the enactment of chapter 13, Public Laws 1913, now C. S., 2513, this suit was not maintainable, but the act of 1913 provides: "The earnings of a married woman, by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

The burden of petitioner's brief is that this statute creates no substantive right; that it merely changes the rule of procedure, and that it applies only to such causes of action as could be maintained by the husband and wife as coplaintiffs before the law took effect. This position is supported by eminent authorities; but to my mind the reasons are not conclusive.

At common law the defendant's demurrer would have been sustained, because his wife could not maintain such an action suing alone; but his conduct would have been no less hurtful and injurious to her. His only defense now is that he and the plaintiff are one by reason of the marriage tie. Shylock, in Shakespeare's "Merchant of Venice," as he stood in court insisting upon the terms of his bond, was in a better position than the defendant in this case. There nothing had been done to increase the burdens and hazards of the party obligated, but not so here. In the case at bar, the strenuous demand for what is called the defendant's legal right forces plaintiff's counsel to play the role of Portia. A mere rule of procedure, based upon the unity of husband and wife, ought not to prevail over plaintiff's claim founded on a willful and deliberate wrong, especially in the face of a statute changing such rule. Surely the plaintiff with propriety can say to the defendant: "If you claim immunity from suit under the common law, by reason of our unity as husband and wife, you must not wrongfully and recklessly commit a tort upon my person, for I can now maintain an action for such a tort—our unity no longer being a bar to my suing alone—and your protection in such instance is taken away by the statute." To hold otherwise would seem to forsake the substance for the shadow. Defendant forgets that his rights in the premises are relative and not absolute.

Again, C. S., 454, provides that a wife may maintain an action without the joinder of her husband: (1) When the action concerns her separate property; (2) when the action is between herself and her husband; and it has been held with us that a wife may maintain an action against her husband to recover possession of her lands and damages for withholding the same, allowing the husband the right of ingress, egress, and regress only (*Manning v. Manning,* 79 N. C., 293), and to enjoin her husband from interfering with her separate property or from collecting her rents. *Robinson v. Robinson,* 123 N. C., 137. See, also, *Graves v. Howard,* 159 N. C., 594. These authorities are decisive of the question so far as property rights are concerned.

But defendant contends that the act of 1913, above set out, is not sufficiently inclusive in its terms to extend to a personal injury or tort sustained by one spouse from the other. In reply to this, it may be observed that the right of a wife to sue her husband, under C. S., 454, is not limited by any provision of the statute to actions involving the rights of property only. Hence, considering the two sections together, I have no difficulty in arriving at the conclusion that the plaintiff's right to maintain this action is an entirely permissible construction.

Furthermore, I hold it to be a sound principle of law, and certainly approved in morals, that, although a man may have a legal right to do a given thing, yet he forfeits that right when he voluntarily and deliberately places himself in a position where it becomes impossible for him to exercise it without hurt or injury to another.

But it is not conceded that the position here taken denies to the defendant any protection which the law affords him. The gravamen of plaintiff's complaint is that the defendant, with knowledge of his diseased condition, willfully, deliberately, and recklessly communicated said vile and loathsome malady to his wife in total disregard for her health and safety. This he never had a right to do. No such right ever existed. Petitioner apparently is confusing conjugal privileges and immunities, which had been forfeited in the instant case, with the personal rights of another.

The plaintiff having the right to sue alone under the statute, all other questions in the case are collateral to this one issue. Defendant's conduct was a willful and deliberate wrong committed without excuse or justification. The foundation of the plaintiff's cause of action is not a new tort, created by the statute, but an old principle newly applied.

I think the case was correctly decided in the first instance, and that the defendant's petition should be denied.

Petition dismissed.

MARGARET SLUDER v. WOLF MOUNTAIN LUMBER COMPANY.

(Filed 9 March, 1921.)

1. Deeds and Conveyances—Seals—Presumptions.

Where a deed acknowledged before a commissioner of affidavits in another State, conveying lands here, does not show the affixing of the commissioner's seal on the record, but this fact is recited in the conveyance, the seal will be presumed, and the validity of the deed will be upheld, nothing else appearing to the contrary.

2. Clerks of Court—Deeds and Conveyances—Fiat—Statutes.

The statutory provision for the fiat of the clerk of the Superior Court for the registration of a deed to lands is directory and not mandatory, and its omission will not invalidate the instrument if it is shown that it has been registered after proper probate.

3. Statutes—Deeds and Conveyances—Defective Probate.

A deed made prior to the enactment of ch. 204, Laws of 1913, at the special session of the Legislature, is validated by the statute, as against the heirs of the grantor, when the deed is in the defendant's chain of title, and the plaintiff, objecting to its introduction in evidence, claims no right or title thereunder.

4. Statutes—Wills—Defective Probate.

A will probated in another State requiring only the examination of one witness, and there are two witnesses thereto, is cured by our statute, ch. 142, Laws 1913 (special session), the same being a defective probate, and not a defect in its execution.

5. Constitutional Law—Statutes—Wills—Defective Probate.

An act of the Legislature which cures previous defects in the probate of a will, and not in its execution, does not impair vested rights of the heirs at law of the grantor, and is constitutional.

APPEAL by plaintiff from *Bryson, J.*, at the May Term, 1920, of JACKSON.

"1. Is the plaintiff, Margaret Sluder, the owner of the land described in the complaint? Answer: 'No.'

"2. Are the defendants, the Wolf Mountain Lumber Company, George H. Smathers, trustee, the owners of the land embraced in State Grant No. 290, to J. T. Foster, as alleged in the answer? Answer: 'Yes.' "

At the conclusion of the evidence the court directed the jury to answer the issues "No," and rendered judgment for the defendant. Plaintiff appealed.

J. G. Merrimon and A. Hall Johnston for plaintiff.
E. C. Ward for defendant.

ALLEN, J. This action involves the title to a tract of land containing 424 acres lying in the county of Jackson, and described in the complaint. The plaintiff introduced the following chain of title: Deed from P. G. Bowman to Nelson B. Gowan, dated 25 May, 1880. Thence deeds and a will connecting the plaintiff with Nelson B. Gowan. The plaintiff then offered, for the purpose of showing a cloud upon her title and as estoppel as against the defendants, a deed from Nelson B. Gowan to F. P. Hooper, dated 17 October, 1896, for one-fourth interest in this land, and then a deed from W. A. Henson, sheriff, to F. P. Hooper, dated 20 June, 1901, for three-fourths interest; thence subsequent deeds connecting the defendants with Nelson B. Gowan. The plaintiff then rested.

The defendant then offered State Grant No. 290, to John T. Foster, dated 9 October, 1856; deed from John T. Foster to Robert L. Dashiell, dated 26 November, 1856; will of Robert L. Dashiell, devising the property to Mary J. Dashiell, his widow, exemplified copy of which was recorded in Jackson County, July 27, 1917; deed from Mary J. Dashiell to defendant, George H. Smathers, dated 23 September, 1908, and then deeds to the Wolf Mountain Lumber Company.

The plaintiff insists that the deed from Foster to Dashiell was never properly probated. This exception cannot be sustained. The acknowledgment of the deed was taken before a commissioner of affidavits of North Carolina for the State of Maryland. No seal appears on the record, but the commissioner recites his official seal, and the same is, therefore, presumed. *Johnson v. Eversole Lumber Co.*, 144 N. C., 717; *Heath v. Cotton Mills*, 115 N. C., 208. However, the statute in force in 1856, the date of the acknowledgment in question, did not require the certificate of acknowledgment made by commissioner of affidavits to be under seal. Revised Code, ch. 21, sec. 2; *Johnson v. Duvale*, 135 N. C., 642; *Johnson v. Lumber Co.*, 144 N. C., 717.

There is no order of the clerk of the Superior Court of Jackson County ordering this deed to registration. We do not think this invalidates the registration. It has been, in effect, held that the fiat for registration is not absolutely essential. The statutory provision for such an order is directory and not mandatory. If the deed be in fact registered after proper probate, the lack of a fiat does not invalidate the registration. *Holmes v. Marshall*, 72 N. C., 37; *Young v. Jackson*, 92 N. C., 144; *Darden v. Steamboat Co.*, 107 N. C., 437; *Hiawassee Lumber Co. v. U. S.*, 288 U. S., 553.

But in any event the probate or registration of this deed is validated by ch. 204, Public-Local and Private Laws of North Carolina, extra session 1913. It is true this statute "is valid as against creditors or purchasers for value from the donor, bargainor, or lessor named in such deed only from the ratification of this act." The act was ratified 11 October, 1913. The plaintiff does not claim under the said deed, and derives no title by any other conveyance from the grantor in said deed.

It is contended "that the court erred in admitting the will of Robert L. Dashiell, for that the same was not properly probated, and was not properly recorded in the State of North Carolina."

We are of opinion that the probate of the will in the State of Maryland was insufficient to pass title to land in the State of North Carolina. The will was dated 28 December, 1877. The witnesses were John M. Phillips and David Terry. David Terry testified that he saw the said testator sign and seal the said annexed writing, and heard him publish, pronounce, and declare the same as and for his last will and testament. That at the time of the doing thereof the said testator was of sound and disposing mind, memory, and understanding so far as this deponent knows, and as he verily believes; and John M. Phillips, the other subscribing witness thereto, was present at the same time with this deponent, and together with him subscribed his name thereto as a witness in the presence of the testator and of each other, at the request of the testator.

There is no evidence that the other witness is dead or beyond the State, or that his testimony cannot be procured. The probate fails to comply with our statute, but we think it is cured by the curative act, ch. 142, Public-Local and Private Laws, extra session 1913. This act contains the following provision, viz.: "That this act shall not apply to pending suits or vested interests, and nothing herein shall be construed to prevent such wills from being impeached for fraud."

This will devises the property to Mary J. Dashiell, under whom the defendants claim by deed dated 23 September, 1908. The plaintiff claims also under the heirs at law of Robert L. Dashiell, by deed dated 14 May, 1917, some time after the act was ratified. We cannot see that the plaintiff had any vested interest in the land at the time of the ratification of the act. She certainly had none from the heirs of Dashiell, because her deed was dated some years afterwards. In our opinion, she had no vested interest derived from Nelson R. Gowan, because it is not shown that he had any title to the land in 1880.

If the will had been defectively *executed,* as if it had one witness instead of two, or if for any reason void, the rights of the heirs could not be affected by subsequent legislation, because this would be to make a will for one who died intestate, but curing a defect in the probate of a will, executed in accordance with our statutes, stands upon an entirely different footing, and if the power cannot be exercised, then all of the legislative acts validating probates of wills are void, because wills are probated after death, and the interest of the heir has then accrued.

The question is, however, foreclosed by the unanimous opinion of the Court in *Vanderbilt v. Johnson,* 141 N. C., 370, which has been approved in *Weston v. Lumber Co.,* 160 N. C., 268, and *Vaught v. Williams,* 177 N. C., 82.

In the *Vanderbilt case* the Court states the facts and its conclusion as follows: "In deraigning his title, the plaintiff offered in evidence the will of John Strother, dated 22 November, 1816. The will is attested by two witnesses, but was admitted to probate in Tennessee upon the testimony of one only. The General Assembly of North Carolina, at its session of 1885, enacted an act to cure the defects in the probate of this will, and to ratify and validate the orders of the probate courts of this State in regard thereto. Private Laws 1885, ch. 52. The referee held that the act 'has not the effect to cure and make valid the probate of said will.' In this we think there is error. We are of opinion that the act is valid and effectual for the purpose for which it was enacted. . . . The defendants do not claim under a deed executed by the heirs at law of John Strother, before the passage of the act, and therefore no vested right intervenes. Legislation validating the probate of deeds, curing defects in privy examinations of married women and the like, has been very common in this State, and has been uniformly upheld."

This case is exactly like the one before us, and, instead of being overruled, it has been twice affirmed on the point now under discussion.

In *Weston v. Lumber Co., supra, Walker, J.,* while discussing the effect of curative acts, says: "The statutes are highly remedial, and should be liberally construed, so as to embrace all cases fairly within their scope. It is constructive legislation; we are saving titles, and not destroying them. It has been said that 'such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.' *McFaddin v. Evans Co.,* 185 U. S., 505. It was further held that to validate defective probates and registrations is a proper exercise of legislative power and favored by the courts."

In the *Vaught case* a curative act was considered, and its effect upon the heirs, who claimed that their interests were vested, and could not be disturbed by subsequent legislation. The decision was against the contention of the heirs, and in the course of the opinion the Court quotes from *In re Patterson,* 132 A. S. R., 126, that, "The heirs had no vested right to have this law forbidding the probate of such wills continued in force. Their right to the estate of the ancestor was given by statute, and it was contingent upon the fact of there being no will in existence which could be proved"; and from *West Side Belt Co.,* 219 U. S., 92: "In *Watson v. Mercer,* 8 Pet., 88 (8 L. Ed., 876), such an act was sustained against a charge that it divested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the Supreme Court of the State against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated," and from 6 R. C. L., 315, that, "The heirs have no vested right in having any law relating to a pending probate continued in force."

The proviso in the act of 1913 to the effect that the act shall not apply to "vested interests" does not affect the result, as we have seen the heirs had no vested interests.

The judgment is
Affirmed.

NOTE. This opinion was written by *Brown, J.*, at last term, except that part discussing the effect of the curative act.

SCOTLAND NECK COTTON MILLS v. SHAW COTTON MILLS, INC.

(Filed 16 March, 1921.)

1. **Vendor and Purchaser—Contracts—Breach—Performance—Time Extended—Waiver—Damages.**

Where the seller has breached his contract of sale and delivery of cotton yarns at a time specified, and there is evidence tending to show that for a certain length of time thereafter the parties regarded the contract in force for the delayed seller to fulfill his obligations thereunder: *Held*, the purchaser could waive the breach and extend the time of performance, and evidence of the price of the yarns at the expiration of the time extended, is competent upon the issue as to the measure of the plaintiff's damages, in his action to receive them. *Hosiery Company v. Cotton Mills*, 140 N. C., 454, cited and applied as to the rule for the measure of damages and the facts of this case.

2. **Instructions—Opinion—Contentions—Appeal and Error.**

Exceptions to the charge of the judge, on the ground of an expression of opinion on the evidence, are untenable, when considering the charge as a whole, it manifestly appears that the error complained of was in the statement of the contention of the parties, impartially expressed and with due regard to the rights of the parties.

APPEAL by defendant from *Lyon, J.,* at the November Term, 1920, of HALIFAX.

This is an action to recover damages for breach of a contract, under which the defendant agreed to deliver to the plaintiff 30,000 pounds of blue yarn at the price of thirty-one cents per pound.

The defendant admitted the execution of the contract and its breach, and the principal controversy was as to the time of the breach, the defendant contending that the breach occurred in June, 1919, and the plaintiff that the breach was on 10 March, 1920.

On the trial of the action the plaintiff was permitted to offer evidence showing the market value of blue yarns on 10 March, 1920, and the defendant excepted upon the ground that all the evidence showed that the breach was in June, 1919.

The market price of yarn increased from June, 1919, to 10 March, 1920.

There are other exceptions taken by the defendant to the charge.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

E. L. Travis, A. P. Kitchin, and George C. Green for plaintiff.
Ashby M. Dunn and Daniel & Daniel for defendant.

ALLEN, J. There was undoubtedly a breach of the contract by the defendant in June, 1919, in that it failed to deliver the yarns according to its agreement, and the plaintiff then had the right to sue to recover damages, but it could also waive the breach, and could extend the time for the performance of the contract, and an examination of the correspondence in the record leads us to the conclusion that there is evidence that both parties treated the contract in force and were expecting performance up to 10 March, 1920; and if so, the time of the breach was a question of fact, to be determined by the jury.

On 10 March the defendant wrote the plaintiff: "I find it impossible to resume shipments on your order, and an adjustment of the matter will have to be made on other lines," indicating that up to that time parties dealt with the contract as still in force.

The letter goes on to state the different efforts made by the defendant to perform the contract, and then says: "We are so badly behind with orders that should have been delivered last fall that it is impossible to figure when we can produce any yarn in excess of our own requirements"; and again, "If the mill could have run you would have gotten your yarn before 1 January," from which it may reasonably be inferred that the parties had not regarded the contract at an end before that time.

It follows, therefore, as there was evidence that the time of the breach was on 10 March, 1920, that evidence of the market value at that date was competent and properly received.

The other exceptions relied on by the defendant are to the statements of the contentions of the parties.

We have examined these with care, and while there are statements which, standing alone, might be held to be expressions of opinion, when the charge is considered as a whole, it is manifest that the judge presiding was only stating the contentions of the parties, and as it appears to us, this was done impartially and with due regard to the rights of both parties.

The rule for the measure of damages laid down for the guidance of the jury is the one approved in *Hosiery Co. v. Cotton Mills,* 140 N. C., 454.

We have carefully considered all of the exceptions, and find nothing that will warrant a reversal of the judgment.

No error.

C. P. HARRIETT ET AL. v. M. N. HARRIETT ET AL.

(Filed 16 March, 1921.)

1. **Betterments—Estates—Tenants for Life—Deeds and Conveyances.**

   One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made.

2. **Same—Rents and Profits—Offsets—Statutes.**

   When one holding under the tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant have received the rents and profits until that time, the remaindermen, after the death of the tenant for life are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. C. S., 700.

APPEAL by defendant from *Connor, J.,* at Spring Term, 1920, of JONES.

This was a petition originally filed for actual partition, and by consent a sale of all the property was ordered, and it was sold. Enough of the proceeds of the sale was left in the clerk's office to protect the matters involved in this appeal, which arise upon a petition by the plaintiff for betterments.

James Harriett was the father of plaintiffs and defendants, and died in 1877, leaving a widow, Mary E. Harriett, who died in 1917, and the plaintiffs and defendants are their only descendants as heirs at law and devisees.

Amos L. Simmons, who was then the owner, conveyed the lands known as the "home place" to James Harriett prior to his death in fee simple by description that included more than 100 acres, which was the quantity intended to be conveyed, and after James Harriett's death, while his children were young, Simmons executed to Mary E. Harriett, the widow and mother of the children, a deed purporting to convey in fee simple the 100 acres known as the "home place," being 100 acres cut out of the original boundary in the deed from Simmons to James Harriett. After the deed was made to Mary E. Harriett, she occupied the land up to the bounds set out in the deed to her, and Amos L. Simmons and his descendants occupied the remainder of the land in the James Harriett deed.

James Harriett left a will, duly probated, devising the said 100 acres to his wife, Mary E., during her natural life, and then to her children. In 1904 plaintiff, under an arrangement with Mary E. Harriett, went on the land, and from 1905 to 1914, ten years, occupied the land, and he or his mother had the rents and profits thereof. In 1908 his mother made him a deed and delivered it to him under an agreement that it was not to be registered until after her death, and plaintiff kept possession of it till it was taken from his safe after he left the home place in 1914. The plaintiff and the defendants thought up to the time of Mary E. Harriett's death that she owned the land in fee simple. It is admitted, however, that she only owned a life estate, and the remainder, subject to her life estate, was in the plaintiff and defendants.

It is alleged in the petition that the plaintiff made valuable improvements upon the land, which enhanced its value, under the honest belief that he would be the owner of the land upon the death of his mother.

The jury returned the following verdict:

"1. Did plaintiff, while making improvements on land described in petition, have a well-grounded belief that he was the owner of the land in fee, subject to the life estate of his mother? Answer: 'Yes.'

"2. Was plaintiff, while making improvements on land described in the complaint, a tenant in common with defendants of said land, subject to the life estate of his mother? Answer: 'Yes.'

"3. In what sum, if any, was the value of the said land enhanced at the death of Mary Harriett in June, 1917, by such permanent improvements as were made during her life by plaintiff? Answer: '$1,780.'

"4. What was the clear annual value of the land during the time plaintiff was in possession of same, exclusive of the use of improvements made by plaintiff? Answer: '$125 per year.'"

Judgment was entered upon the verdict in favor of the plaintiff, allowing him the value of the improvements assessed by the jury without abatement on account of the rents, and the defendants excepted and appealed, assigning the following errors:

1. In refusing to direct the jury to answer the first issue "No."
2. In refusing to charge the jury, "If you believe the evidence, you should answer the first issue 'No.'"
3. In the submission of the first issue to the jury.
4. In the submission of the second issue to the jury.
5. In the submission of the third issue to the jury.
6. In not setting aside the verdict.
7. In not signing the judgment tendered that the defendants go without day.
8. In signing the judgment set out in the record.
9. In refusal to credit the $1,780 found on the third issue with the $1,250 for the ten years rental at $125 per year found under the fourth issue.
10. In not crediting on the $1,780 found on the third issue with rent at the rate of $125 per year from the beginning of the year 1905 to the date of Exhibit "A," 23 May, 1908.
11. For that the judgment as rendered did not deduct from the $1,780 found on the third issue, 7150/15875 of $1,780 being the pro rata part of the land other than the home place of the unimproved value of the whole land.

W. D. McIver and R. A. Nunn for plaintiff.
Ward & Ward for defendants.

ALLEN, J. The issues submitted to the jury are raised by the pleadings, and are substantially like those approved in *Pritchard v. Williams,* 176 N. C., 110, and as there was evidence supporting the contention of the plaintiff that he made valuable improvements on the land, believing in good faith that he would own it in fee upon the death of his mother, under a deed executed by her, the court could not direct a verdict in favor of the defendants.

The fact that there was an outstanding life estate in the plaintiff or in his mother is not a bar to the claim for betterments, since the plaintiff claimed under a deed and believed he owned the fee.

"It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements, nor can a charge upon the lands or the inheritance be made for such improvements, it being generally held that a life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire, and also that improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman. Mere knowledge on the part of the remainderman that improvements are being made, and passive acquiescence therein are not sufficient to charge him with the cost thereof. An exception has been made where the life tenant is an infant, and the income from the property is by order of the court invested in permanent improvements. Ordinarily, a third person claiming under the life tenant is entitled to no greater rights than the life tenant himself, but some courts, applying equitable principles, have allowed recovery where improvements have been made by a person who, although in fact holding under a life tenant, believed himself to be the owner of the fee." 17 R. C. L., 635.

Our Court has adopted the view allowing betterments to one holding under a life tenant when made under the honest, well-grounded belief that he owns the fee. *Pritchard v. Williams, supra,* and the same case at this term.

The cases upon the right of a life tenant to compensation for improvements are collected in the note to *Porter v. Osmun,* 3 Anno. Cases, 689.

This disposes of the first, second, third, fourth, and 5th assignments of error, the sixth, seventh, and eighth are formal, and the ninth, tenth, and eleventh present the question of the right of defendants to set off against the improvements the rents and profits of the land during the occupancy by the plaintiff.

The usual rule is undoubtedly that one claiming betterments is chargeable with the rents, even beyond the three years, as an offset against a recovery for the improvements (Con. Stat., sec. 700; *Whitfield v. Boyd,* 158 N. C., 453), but this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him. It awards to the owner the land and his rents, and to the occupant the value of his improvements, but in this case the owners were not entitled to the rents during the occupancy by the plaintiff, because of the life estate in his mother or in the son, one of whom was the owner of the rents, and consequently there can be no abatement of the recovery for the improvements in favor of the defendants on account of the rents, to which they have no claim or right.

It is upon this principle that the rights of the parties were adjusted in *Pritchard v. Williams,* which is also reported in 175 N. C., 319, and 178 N. C., 444.

No error.

Z. V. WHICHARD ET AL. v. C. J. WHITEHURST ET AL.

(Filed 16 March, 1921.)

1. **Deeds and Conveyances—Fee—Heirs—Wills—Devises—Intent.**

While prior to 1879 (C. S., 991) the word "heirs" was generally necessary to create a fee simple estate, there is exception as to devises and equitable estates, and these may pass without the word "heirs" if such intention appears by correct interpretation of the instrument.

2. **Same—Interpretation—Intent.**

Where it appears from the construction of a deed made in 1871 that the land granted was to his daughter in lieu of her share in the grantor's estate, the construction of this deed will be governed by the principles applicable to the interpretation of devises and equitable estates arising under a will, when expressed in the instrument as being in the nature of, or a substitute for, a devise.

3. **Same—Estates—Tenants in Common.**

Where, in 1871, a father has conveyed certain of his lands to his daughter, "and her nearest blood relations," in lieu of her share in his estate, and from the interpretation of the instrument as a whole this intent clearly appears, and is evidenced by the donor's express language, such intent will control the interpretation, and the daughter takes a fee simple title to the whole, and not that of a tenant in common with her children.

4. **Deeds and Conveyances — Equity — Case Agreed — Cancellation — Statutes.**

While ordinarily it was necessary to invoke the jurisdiction of a court of equity to correct a deed to lands made before 1879 (C. S., 991), so as to show that in fact it was intended to convey a fee simple title, when the word "heirs" had been omitted, yet, when the cause is submitted upon a case agreed (C. S., 961), the court, in its equitable powers, may correct the instrument, when it clearly appears from the interpretation thereof that the donor intended to pass a fee simple title, and had unintentionally omitted therefrom the word "heirs."

STACY, J., dissenting; ALLEN, J., concurring in the dissenting opinion.

APPEAL by plaintiffs from *Devin, J.*, at January Term, 1921, of PITT.

This case was submitted under C. S., 961, upon the following "facts agreed." In 1871 John F. Whichard and his wife conveyed to their daughter the land in controversy, duly described, "unto said Anne E. Page and her nearest blood relations forever."

At the date of said deed, said Anne E. Page had living one son, named Billy Page, who died before reaching his majority, and left no children, but since the date of said deed there has been born to her five children, who were living when Billy died.

In 1910 said Anne E. Page conveyed said land to the wife of one of her sons in fee simple, who subsequently conveyed the same, with the joinder of her husband, to the plaintiffs. This proceeding was instituted for the purpose of selling the land for partition, and was bought by the defendants, who now decline to accept a deed from the commissioner and pay for the land solely upon the ground that they cannot obtain fee simple title to the same. The court held that the plaintiffs were entitled to an undivided one-half interest in the land by reason of the deed from Anne E. Page, and to a one-tenth undivided interest by reason of the deed from C. F. Page and wife, but that the other four defendants, children of Anne Page, are the owners in fee simple of an undivided four-tenths, as tenants in common, interest in said lands, from which judgment the plaintiffs appealed.

S. J. Everett for plaintiffs.
Skinner & Whedbee for defendants.

CLARK, C. J. Prior to the act of 1879, now C. S., 991, the word "heirs" was generally held necessary to the creation of a fee-simple estate in conveyances, but there was an exception as to devises and equitable estates, as to which it was held that an estate of inheritance would generally pass without the word "heirs" if such was the clear intent of the parties. *Holmes v. Holmes,* 86 N. C., 205-207, cited by *Hoke, J.: Smith v. Proctor,* 139 N. C., 319. This conveyance is in the nature of a devise, or rather is a substitute for it, and is so expressed.

This is not a conveyance to Anne E. Page for life only and then to her nearest blood relations, but the conveyance is to "Anne E. Page and her nearest blood relations forever." In *Cullens v. Cullens,* 161 N. C., 344, it is stated that it is settled in this State that when a conveyance of land is made to a woman "and her children," the grantee named and her children living at the date of the deed are tenants in common, but we think that upon the face of this deed the intent was not to convey the land to Anne E. Page and her living son, Billy Page, as tenants in common, but that the true intent was to convey the land to her in fee simple. In *Beacom v. Amos,* 161 N. C., 366, it is said: "The law will not allow the plain intent to be defeated by any omission to use technical terms to express it, if equivalent terms are employed for the purpose." This conveyance recites in the first paragraph that it is made "to Anne E. Page, daughter," by the grantors, saying in the second paragraph that the consideration is "natural love and affection for her"; and the fourth paragraph recites that "this and the other property given to our said daughter is a full and equitable share of all our property, and we do hereby declare that in case we die intestate she shall never inherit anything else from our estate." There is no indication that it was intended that the "nearest blood relations" were to be beneficiaries of any interest in said conveyances, the consideration of which was "love and affection to the daughter," and, together with other property given her, was "her full and equitable share" of all the property of the grantors, and upon that ground they disinherit her from inheriting any other part of their estate if they should die intestate.

As far back as *Armfield v. Walker,* 27 N. C., 583, it was held that, "If a deed for a valuable consideration give land to another and his heirs, it is a good deed on delivery to pass the estate in fee, notwithstanding it being very informally framed, Co. Lit., 7 (a); Kent's Com., 461, and it is a rule of law that if two constructions can be placed upon a deed, or any part, it shall be given that which is most beneficial to the grantee." The decisions since have extended and broadened the application of the principle that the intention of the grantor is to be considered in the interpretation of a deed. *Smith v. Proctor,* 139 N. C., 314; *Fulbright v. Yoder,* 113 N. C., 456; *Winborne v. Downing,* 105 N. C., 20; *Vickers v. Leigh,* 104 N. C., 248; *Hicks v. Bullock,* 96 N. C., 164; *Ricks v. Pulliam,* 94 N. C., 225; *Bunn v. Wells,* 94 N. C., 67. Indeed, the latest decisions hold that the intention now is to be gathered from the whole deed, without dissecting it into parts as at common law. *Guilford v. Porter,* 167 N. C., 366; *Triplett v. Williams,* 149 N. C., 394.

In *Fulbright v. Yoder,* 113 N. C., 456, it is held, citing *Holmes v. Holmes,* 86 N. C., 205, that "although words of inheritance are omitted in a deed, yet, if the real intention of the grantor appear to be to confer a fee, that effect will be given to the limitation." In that case the deed was made in 1860, and like this, was made to a son, and the Court held that while this construction "is not supported by text-writers or the previous decisions of this Court, yet it is believed to be founded upon more equitable principles in arriving at the real intention of the grantor. It is also in accord with the spirit of recent legislation, Code, 1280 (now C. S., 991), which declares the limitations without the use of the word 'heirs' shall be construed as limitations in fee, unless a contrary intention plainly appears." This case has been cited often since, among others, in *Helms v. Austin,* 116 N. C., 753, and *Smith v. Proctor,* 139 N. C., 314.

Among other cases, *Moore v. Quince,* 109 N. C., 92, and *Rackley v. Chestnutt,* 110 N. C., 262, hold that where the instrument upon its face contains sufficient evidence of a manifest purpose of the grantor to convey an estate in fee it will be so construed. Formerly the Court, in its efforts to effectuate the grantor's intent, had resort to equitable principles, or lay hold upon expressions in other parts of the deed containing the sacramental words "heirs" and transposed it into the conveying clause, and would go through the formality of requiring an amendment or correction of the deed. The later decisions, as above set forth, conforming to the evident intention of the parties and the legislative construction dispensing with the word "heirs" have resorted to the direct process of construing the conveyance to mean in fee when such intention clearly appears. In this case, in addition to what is already said, the intention of the grantor to convey a fee simple to the daughter is apparent from the reading of the whole deed, for not only the grantor uses the words "her equitable share," "her," "she," but adds the clause, "forever," which evidently intended to convey the property in fee to her. There is no limitation of a life estate, or any intention indicated to convey any interest therein to her son.

In a very illuminative opinion in *Beacom v. Amos,* 161 N. C., 365, citing numerous cases, *Walker, J.*, thus quotes from *Gudger v. White,* 141 N. C., 507, as a correct statement of the modern rule for the construction of deeds: "We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'" And again: "Words should always operate according to the intention of the parties, if by law they may, and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. This is the more just and rational mode of expounding a deed, for if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor."

Ordinarily in a deed of this kind of date prior to 1879, even when containing on its face sufficient evidence of an intent by the grantor to convey the fee, a suit to correct the instrument is required; but this cause being submitted on case agreed, or when all the facts affecting the rights of the parties are set forth, and there being plenary evidence on the face of the instrument itself that a fee-simple estate was intended, the Court, in the exercise of its equitable powers, is fully justified in treating this as a suit to correct the instrument by inserting the word "heirs", and so carry into effect the evident intent of the parties. *Vickers v. Leigh,* 104 N. C., 248.

Construing the conveyance, therefore, according to its meaning and intent as appears upon the face of the instrument, we think the conveyance was to her, the daughter, in fee simple, though inartificially expressed.

The grantee so understood it and made the conveyance in fee simple to the wife of one of her sons, who has since joined in the conveyance to the plaintiffs in this action. All of the children of Anne Page for over 30 years have acquiesced in the sole possession by their mother, and for 10 years in the conveyance by her.

We think upon the facts agreed that judgment should have declared that the plaintiffs were owners in fee simple, and that the purchasers should pay the purchase money.

Reversed.

STACY, J., dissenting: The deed submitted for construction in this proceeding was made in 1871. In the granting clause these words appear: "unto the said Anne E. Page and her nearest blood relation forever"; and the habendum contains the following language: "To have and to hold said tract of land and premises, with all the appurtenances thereto belonging to her, the said Anne E. Page, and her nearest blood relation." At the time of the execution and delivery of said deed, Anne E. Page had only one son living, Billy Page, who was her nearest blood relation. The word "heirs" appears nowhere in the conveyance, either in connection with the names of the grantors or the grantees. It is omitted entirely from the instrument.

In the majority opinion it is conceded that prior to the enactment of chapter 148, Public Laws of 1879, in real property conveyances the use of the word "heirs" in connection with the name of the grantee was necessary to convey a fee-simple estate; except in devises and trusts, or equitable estates, where it clearly appeared that a fee simple was intended. As stated by *Mr. Justice Hoke,* in *Smith v. Proctor,* 139 N. C., 314: "It is true that prior to the act of 1879 the word 'heirs' was generally held necessary to the creation of a fee-simple estate in deeds conveying the legal title. It was not so in devises nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word 'heirs' if such was the clear intent of the parties," citing *Holmes v. Holmes,* 86 N. C., 205.

The case at bar, however, comes under neither of these exceptions. The instrument is not a devise, nor do we think it can be held as a substitute for one. It fails in many respects to meet the requirements of a valid will. It is a deed only, and we are asked to construe it as such. It does not purport to create or convey a trust estate, and no equitable relief is sought. The pleadings present only a construction of the deed as a question of law. The parties have thus elected to stand upon their rights, and the case should be decided accordingly.

It has been held with us, in a long line of decisions, that as a mere construction of the legal title on the face of the instrument, in deeds bearing date prior to the statute of 1879, the use of the word "heirs," in some way descriptive of the grantee's interest, was necessary, and always required, for the creation of a fee-simple estate. *Boggan v. Somers,* 152 N. C., 390; *Real Estate Co. v. Bland,* 152 N. C., 225. And where the word "heirs" or words of inheritance are entirely omitted from the deed, only a life estate passes by such conveyance. *Cullens v. Cullens,* 161 N. C., 344; *Batchelor v. Whitaker,* 88 N. C., 350. "There is no principle of law better established than that the word 'heirs' is absolutely necessary in a deed (executed prior to 1879) to convey a fee-simple estate." *Stell v. Barham,* 87 N. C., 62. The omission of the word "heirs" or words of inheritance from a deed, if executed before the act of 1879, will have the effect of vesting only a life estate in the bargainee. *Anderson v. Logan,* 105 N. C., 266; *Boggan v. Somers, supra.*

It should be remembered that the aid of equity is not invoked in this case. There is no allegation that the word "heirs" or words of inheritance were omitted by mistake, inadvertence, etc., which would bring the case under the doctrine announced in *Fulbright v. Yoder,* 113 N. C., 456; *Rackley v. Chestnutt,* 110 N. C., 262; *Vickers v. Leigh,* 104 N. C., 248; *Rutledge v. Smith,* 45 N. C., 283; *Armfield v. Walker,* 27 N. C., 583; *Real Estate Co. v. Bland, supra;* and other cases to like import. Nor is there any question of a trust or equitable estate involved, as in the cases of *Moore v. Quince,* 109 N. C., 89; *Holmes v. Holmes,* 86 N. C., 205, *supra,* and *Smith v. Proctor, supra.*

But conceding, for the moment, that the instrument clearly shows an intention on the part of the grantors to convey a fee-simple estate, and that upon proper allegations the deed should be reformed or corrected; how can we say that Anne E. Page is to take a fee simple, and Billy Page, her nearest blood relation living at the time of the execution of the deed, is to take no interest at all? It was held in *Cullens v. Cullens, supra,* that a deed, executed prior to 1879, to "Sarah A. Cullens and her children" conveyed only a life estate; but that the woman and her three children, living at the time, took as tenants in common, and that the children were entitled to share with the mother in the estate, citing *Campbell v. Everhart,* 139 N. C., 511; *Heath v. Heath,* 114 N. C., 547; *Gay v. Baker,* 58 N. C., 344, and *Dupree v. Dupree,* 45 N. C., 164.

For the foregoing reasons, and on account of the numerous decisions in our reports *contra,* we are unable to agree with the conclusions reached in this case by a majority of the Court.

ALLEN, J., concurring in dissent.

MUSCO BUTLER AND WIFE, ESTHER R. BUTLER, v. N. A. BELL AND WIFE, EVA BELL ET AL.

(Filed 16 March, 1921.)

1. **Deeds and Conveyances—Revocation—Estates—Merger.**

Where land is conveyed in fee, reserving a life estate to the grantors, and thereafter they make a deed to the same lands to the same grantors, conveying an absolute fee simple title, stating its purpose to revoke the prior deed, the question of merger does not arise, and instead of being two estates, one a particular estate for life and the other a remainder in fee, the prior deed being revoked by the second one, there is but one estate, which is an absolute fee simple one.

2. **Deeds and Conveyances — Mental Incapacity — Voidable Deeds — Purchaser.**

A deed by one legally incompetent to make it is not void, but valid for all purposes, until assailed or set aside at the instance of those having an interest to impeach it, and a subsequent grantee who is not an innocent purchaser for value without notice of the incapacity of the original grantor stands in the same category as his grantor.

3. **Deeds and Conveyances—Voidable Deeds—Color of Title.**

A deed to lands voidable for the incapacity of the grantor to make it, is not for that reason deprived of its sufficiency as color of title.

4. **Same—Purchasers—Limitation of Action—Adverse Possession.**

A grantee who has acquired a voidable title to lands under sufficiently colorable deeds, may ripen his defective title into a good one by sufficient adverse possession thereunder, which is a distinct or separate source of title from the one under which he had entered possession of the lands.

5. **Equity—Laches—Limitation of Actions—Deeds and Conveyances—Voidable Deeds—Merger—Adverse Possession—Color of Title.**

Where a voidable but colorable deed to lands reserving a life estate has merged under a second and voidable deed conveying the title in fee without reservation, and such right has been acquired by a subsequent purchaser of the lands, equity will not permit an adverse claimant with notice to sleep upon his right until the purchaser has acquired title by sufficient adverse possession under the color of his deed, and then successfully assert his right.

6. **Deeds and Conveyances—Color—Possession—Notice.**

The possession of one under color of title is notice of his claims of title to the lands.

7. **Actions—Ejectment—Deeds and Conveyances—Cancellation—Cloud on Title.**

An action to set aside voidable deeds under which the defendants in possession claim the lands in controversy, and for the possession of the land, is one in ejectment, the remedy of cancellation being ancillary to the main relief sought to remove a cloud upon the title, and to recover the *locus in quo.*

8. Limitation of Actions—Deeds and Conveyances—Color of Title—Coverture—Statutes.

In this suit to cancel the deeds to the *locus in quo*, because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color: *Held*, the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant's title. C. S., 408.

APPEAL by plaintiff from *Connor, J.*, at September Term, 1920, of SAMPSON.

It appears in the record that prior to 26 June, 1903, W. A. Bell was the owner of several tracts of land in Sampson County, and desiring to divide them among certain of his children and grandchildren, he caused them to be surveyed, and then conveyed the lots, as shown in the survey, to his children and grandchildren, except the plaintiff, Esther R. Butler, one of his children, who alleges that her father intended to give and convey to her the 100 acres of his land, which is the subject of this suit, and that he made his will in 1898, and devised it to her therein. He died in 1905. It further appears that, on 26 June, 1903, the defendant, N. A. Bell, son of W. A. Bell, procured from the latter and his wife a deed purporting to convey to N. A. Bell the said 100 acres, but reserving a life estate to themselves; and that on 30 April, 1904, N. A. Bell received another deed for the same land from W. A. Bell and his wife conveying to them, N. A. Bell and wife, a fee simple absolute in the same land without any condition or reservation whatever, and with full covenants. It is expressed in this deed that it is made for the purpose of revoking the former deed to the same person for the same tract of land. Afterwards, on 21 January, 1905, the defendants, N. A. Bell and wife, conveyed by deed to their codefendant, Nathan Barefoot, the same tract of land in fee simple and without any condition or reservation, and with full covenants of seizin, warranty, and against incumbrances.

Plaintiff brought this action to set aside said deeds, and alleged that at the time the first two deeds were executed by W. A. Bell and wife, W. A. Bell was not mentally capable of making them, and that the defendants, N. A. Bell and wife, Eva Bell, and Nathan Barefoot, well knowing that to be the case, deliberately and fraudulently conspired between themselves to take advantage of it in order to procure the first two deeds, so that the land could be conveyed to the defendant, Nathan Barefoot, which was afterwards done in pursuance of the previous understanding and conspiracy between them.

Defendants denied that there had been any fraudulent conduct whatsoever on the part of the three defendants named, or any of them, and especially denied that W. A. Bell was *non compos mentis,* or even of weak mind, when the first two deeds were made, or that any advantage was taken of him by them, or either of them. That all of the transactions, including the execution of the Barefoot deed, were open and above board, and the deeds founded upon a valuable consideration, and nothing was done by them, or either of them, which should impeach or impair their validity, and that the defendants were purchasers in good faith and for valuable considerations. They further aver that all of the said deeds were duly probated and registered immediately after their execution, and have been spread upon the public record ever since and until the present time, and that plaintiffs had full notice and knowledge thereof for many years before this action was commenced in 1916, and especially for more than three years; and, therefore, they plead that for this reason alone, if for no other, the plaintiffs are debarred from any recovery in this case. They further aver, in denial of plaintiffs' title and right to recover the land in controversy, that at the time he received his deed, and ever since, and for more than seven years before this action was brought, the defendant, Nathan Barefoot, has been in the open, notorious, and adverse possession of this land, claiming the same as his own, under the said deed, which was known to plaintiffs, and that even if there was originally any defect in his title under said deeds, he has acquired a good and indefeasible one by virtue of his possession, held adversely under the same, and continued as aforesaid.

The jury returned the following verdict, upon the issues submitted to them:

"1. At the time of the execution of the first deed from Willis A. Bell and wife to the defendant, N. A. Bell, on 26 June, 1903, did the said Willis A. Bell have sufficient mental capacity to execute a deed? Answer: 'No.'

"2. At the time of the execution of the second deed from Willis A. Bell and wife to N. A. Bell and wife, on 30 April, 1904, did the said Willis A. Bell have sufficient mental capacity to execute a deed? Answer: 'No.'

"3. Was Nathan Barefoot an innocent purchaser for value, without notice of any lack of mental capacity of Willis A. Bell to execute the deeds referred to in issues one and two, for the land described in the deed from N. A. Bell and wife to Nathan Barefoot, dated 25 June, 1905? Answer: 'No.'

"4. Is the plaintiffs' cause of action barred by the three years statute of limitations? Answer: 'Yes.'

"5. Is the plaintiffs' cause of action barred by the seven years statute of limitations? Answer: 'Yes.' "

The court charged the jury that although an estate for their lives was reserved in the first deed by W. A. Bell and his wife, it was merged by the second deed, and the Barefoot deed in the remainder, and, therefore, the statute of limitations began to run against plaintiffs when the merger took place, and that, as Nathan Barefoot had held the possession of the land continuously, notoriously, and adversely under his deed for more than three years, and also for more than seven years before the commencement of this action, the plaintiffs' cause of action, if they had any, is barred by the statute of limitations, and that the facts being admitted, the jury should answer the fourth and fifth issues "Yes."

Judgment on the verdict, and appeal by plaintiffs.

Grady & Graham for plaintiffs.
Fowler & Crumpler for defendants.

WALKER, J., after stating the case: The admitted facts, as above set forth, justified his Honor's instruction to the jury on the third and fourth issues. It will be observed that the issues did not correspond with the allegations, as stated in the complaint, and denials in the answer. There is no finding of a conspiracy to defraud the plaintiffs, nor of any actual fraud committed by defendants. The simple and only finding is, that at the time the two deeds were made by W. A. Bell he did not have sufficient mental capacity to execute them, and that Nathan Barefoot purchased from N. A. Bell and his wife with notice of this fact. We need not consider this feature of the case any further, as we will base our decision on other grounds. The plaintiffs contended that there was no merger of the life estate with the remainder, and that the statute of limitations did not bar them, as they could not sue until the life estate expired. Defendants contended that there was such a merger, and therefore no life estate to prevent the statute from barring the plaintiffs.

According to our view of the record, the question of merger does not arise. The first deed, or the one to N. A. Bell, alone, dated 26 June, 1903, and registered in Book 126, at page 438, conveyed the fee to him, reserving a life estate to the grantors. The second deed, dated 30 April, 1904, and registered in Book 130, at page 44, conveys the fee simple absolute to N. A. Bell and his wife, Eva A. Bell, without any reservation or condition, and contains the following recital: "This deed is for the purpose of revoking prior deed for said land, which is now on record, and the land known as the "Bass place," found in Book 126, page 438." The deed which is revoked is the first deed, the one to N. A. Bell alone, each of the two deeds conveying the same tract of land, as is alleged in the complaint and admitted in the answer. So that instead of there being two estates, one a particular estate for life, and the other a remainder in fee, there is but one estate, the highest known to the law, as Blackstone says, and that is a fee simple absolute, and this is so, because the former deed, by consent of the parties to it, has been revoked and set aside by their solemn legal act, it being the one in which the grantors reserved a life estate, and the parties then substituted therefor a deed conveying the entire interest and estate in the land in fee simple. Both deeds conveyed the land, even though it was afterwards found that the grantor did not have sufficient mental capacity to do so. But they were not void for this reason, but only voidable, and were valid for all purposes, until assailed and set aside at the instance of those having an interest to impeach them. 13 Cyc., 591; *Sprinkle v. Wellborn,* 140 N. C., 163. And the deed to the defendant, Nathan Barefoot, stands in the same category, for at most it was only voidable when attacked by the interested party, the *feme plaintiff,* and valid until set aside at her instance. It therefore constituted color of title, and when the defendant, Nathan Barefoot, entered into possession under it and continued in possession openly, notoriously, continuously, and adversely for seven years, he thereby acquired a good title as against the true owner. There can be no question that the deed to Barefoot was good color of title. It had the appearance of passing the title, and professed to pass it, but failed to do so. *Seals v. Seals,* 165 N. C., 409; *Norwood v. Totten,* 166 N. C., 648, where the principal cases are collected by the *Chief Justice; McConnell v. McConnell,* 64 N. C., 342; *Perry v. Perry,* 99 N. C., 273; *Ellington v. Ellington,* 103 N. C., 58; *Smith v. Proctor,* 139 N. C., 324. We held in *Seals v. Seals, supra:* "A claim to property under a conveyance, however inadequate to carry the true title, and however incompetent the grantor may have been to convey, is one under color of title, which will draw to the possession of the grantee the protection of the statute of limitations," citing *Wright v. Matheson,* 18 How. (U. S.), 50 (15 L. Ed., 280); *Beaver v. Taylor,* 1 Wall. (U. S.), 637 (17 L. Ed., 601); *Cameron v. U. S.,* 148 U. S., 301 (37 L. Ed., 461). And our cases are to the same affect. *McConnell v. McConnell, supra; Burns v. Stewart,* 162 N. C., 360. So that while Barefoot did not get the title by his deed, but acquired it in another way and from a different source, by his adverse possession under color, this title must, therefore, prevail against the plaintiffs' prior right. Judge Connor charged that plaintiffs knew of the facts, that Barefoot was in possession, claiming to hold adversely to them under his deed, which conveyed the entire title, when taken in connection with the deed of W. A. Bell and wife to his grantors, N. A. Bell and wife, the first deed to N. A. Bell having, by consent of parties, been revoked and put out of the way as if it had never existed. There is no room for arguing that there are two separate estates, one for life and the other in remainder, as the last deed, or the one to N. A. Bell and wife, passed only one estate, which was a fee simple absolute, and destroyed the former life estate instead of merging it. If that is not incontrovertibly true, and the parties intended that there should be two estates, there was no use in making the last deed; and, besides, it clearly expresses on its face the contrary intention of the parties. If there had been a case of merger, equity would not keep the two estates apart, for it will not aid one who is guilty of laches in prosecuting his rights, or who lies by while the title of another is maturing with his full knowledge, and does nothing, when it was so easy to prevent the operation of laches or the statute of limitations by simple procedure. Litigation must end somewhere (*interest reipublicae ut sit finis litium*). Equity aids the vigilant, not the indolent. *Justice Story* well observed that it has often been a matter of regret in modern times that in the construction of the statute of limitations (21 Jac., 1, c. 16), the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defense, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to deprive any one of his just rights by lapse of time, but to afford security against stale demands. The possession of the land by defendant, Nathan Barefoot, was, in law, notice of his claim. *Tankard v. Tankard,* 79 N. C., 54.

And as to the maxim that the law aids the vigilant and not those who sleep over their rights, *Sir William Blackstone* said, that in all possessory actions there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary; for if he be unreasonably negligent, the law refuses afterwards to lend him any assistance to recover the possession, both with a view to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. And it was said by the Vice Chancellor, in *Manby v. Bewick*, 3 K. & J., 352, the Legislature has in this, as in every civilized country that has ever existed, thought fit to prescribe certain limitations of time, after which persons may suppose themselves to be in peaceable possession of their property and capable of transmitting the estates of which they are in possession without any apprehension of the title being impugned by litigation in respect of former transactions.

This is really ejectment, the remedy of cancellation being resorted to as ancillary, merely to the primary relief, or, in other words, it is in its essence a suit to remove a cloud or obstruction out of the way of effectuating the main purpose, which is the recovery of the land. Against such a recovery the statute bars, for it is so expressly provided therein.

The coverture of plaintiff will not avail her. Consol. Statutes, vol. 1, sec. 408, and note; *Carter v. Reaves,* 167 N. C., 131; *Graves v. Howard,* 159 N. C., 594.

We therefore conclude that plaintiffs were barred by the three years statute, and also by adverse possession under color for seven years, as held by the court below.

No error.

H. S. THOMAS, EXR., v. HATTIE HOUSTON ET AL.

(Filed 16 March, 1921.)

1. **Gifts—Causa Mortis.**

To establish a gift *causa mortis,* it must be shown that the donor intended the transfer of the subject-matter and a present actual or constructive delivery thereof, in the contemplation by the donor of his death from a present illness or some immediate peril.

2. **Same—Inter Vivos—Intent—Delivery.**

Evidence that the donor had deposited money in the bank and had received a certificate therefor, payable to the order of himself, or his wife, and had deposited the certificate in his wife's trunk among his valuable papers, when he was in good health and attending to his business, is insufficient to establish a gift of the money to his wife, either *causa mortis* or *inter vivos,* and evidence that at the time he had stated to the cashier that he desired his wife to have the money in case of his death, and especially without having communicated this intent to his wife, and without further evidence of delivery, was insufficient.

3. **Gifts—Inter Vivos—Intent—Delivery.**

To constitute a valid gift *inter vivos,* there must be a donative intent and a present unconditional delivery to the donee or some one for him, making a completely executed transfer to the donee of the present right of property and its possession.

4. **Same—Nudum Pactum.**

To constitute a gift *inter vivos,* it is necessary to show a delivery as well as a donative intent, and without a present actual or constructive delivery it is only a promise of a gift, without consideration, and unenforcible.

5. **Same—Causa Mortis.**

The chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis,* are that the former is absolute, and the latter is revocable and takes effect *in futuro,* and in each instance it is necessary to show both the present intention to make the gift and the delivery of the thing given.

6. **Wills—Interpretation—Money on Deposit—Certificates of Deposit—Evidence.**

As to whether a certificate of deposit will pass under a bequest in a will of "money on hand," quere? and: *Held,* this interpretation will not pre-

vail when a contrary purpose is quite apparent; and evidence of the declaration of the testator of what he wanted done with the money in the bank, is incompetent.

APPEAL by defendant, Hattie Houston, from *Connor, J.,* at November Term, 1920, of DUPLIN.

Civil action, brought to determine the ownership of $1,500 deposited in the Bank of Beaulaville by plaintiff's testator on 26 February, 1917, taking from the bank a certificate of deposit in words and figures as follows, to wit:

BEAULAVILLE, N. C., 26 February, 1917.

This is to certify that R. C. Houston has deposited with the Bank of Beulaville fifteen hundred dollars, payable in current funds to the order of himself or wife, Hattie Houston, on return of this certificate, properly indorsed, with interest at 4 per cent per annum if left three months.

No interest after one year unless renewed.

(Signed) A. L. CAVENAUGH, *Cashier.*

The cashier of the bank testified that at the time of this deposit the deceased stated "he wanted to deposit it on interest so that in case he died, leaving the money in the bank, his wife, Hattie Houston, could get it." There was also evidence tending to show that R. C. Houston, the deceased, on the date of issuance of said certificate of deposit, placed the same in his wife's trunk, where his deeds, notes, and other valuable papers were kept.

The deceased also left a will, from which it appears no specific disposition was made of this certificate of deposit as such, and the residuary legatees, save the appellant, contend that this item would pass under the residuary clause.

His Honor, being of opinion that the evidence was insufficient to establish a gift to Hattie Houston, instructed the jury to answer the issue of ownership in favor of the plaintiff. From the verdict thus rendered, and judgment thereon, the defendant, Hattie Houston, excepted and appealed.

Gavin & Blanton for appellant.
H. D. Williams for appellees.

STACY, J. The appellant in her brief takes the position that under the evidence offered his Honor should have submitted to the jury the question as to whether the certificate of deposit would pass to her as a gift *causa mortis.* We do not think this position tenable. To constitute a gift *causa mortis* not only is an intentional transfer and actual or constructive delivery necessary, but it must be made in view of impending dissolution, or in contemplation of death from a present illness or some immediate peril. 12 R. C. L., 962; *Patterson v. Trust Co.,* 157 N. C., 13; *Newman v. Bost,* 122 N. C., 524, and *Wilson v. Featherston,* 122 N. C., 750. As very tersely and succinctly stated in *McCord v. McCord,* 77 Mo., 166: "To constitute such a gift, it must be made in the last illness of the donor, or in contemplation and expectation of death. There must be a delivery of the subject by the donor, and it is 'defeasible by reclamation, the contingency of survivorship, or deliverance from peril.' (2 Kent Com., 444.) It must be a delivery as a gift, and such a delivery, as in case of a gift *inter vivos,* would invest the donee with the title to the subject of the gift."

In the instant case, there is no evidence of any intentional gift accompanied by an actual or constructive delivery during the last illness of the deceased. He was up and about his business at the time the money was placed in bank; and there is no evidence that anything transpired between him and his wife with respect to this certificate of deposit subsequent to the date of its issuance which would amount to a valid transfer. It does not appear that any delivery was ever made to the appellant. It is true the certificate was placed in her trunk, where her husband kept his deeds and other valuable papers, but there is no evidence of any intention to thus deliver it to her. Under the circumstances it is not even clear that it was in her possession. Even if it were, delivery and possession are two different things. Possession may be had where no delivery has been made; but there can be no valid delivery unless possession, actual or constructive, accompanies it. *Whalen v. Milholland,* 89 Md., 199.

Around every other disposition of the property of the dead the Legislature has thrown safeguards, and wisely so. Around this mode *(donatio mortis causa)* the requirement of actual or constructive delivery is the only substantial protection which the law affords, and the courts should not weaken this salutary requirement and wise precaution by permitting the substitution of convenient and easily proven devices. *Keepers v. Fidelity Co.,* 56 N. J. L., 302.

On the other hand, we do not think the evidence sufficient to warrant a finding of a gift *inter vivos.* Not only must there be a donative intent, but delivery is an indispensable requisite to such a gift under our law. *Gross v. Smith,* 132 N. C., 604. It cannot be made to take effect in the future. *Minor v. Rogers,* 40 Con., 512; *Askew v. Matthews,* 175 N. C., 187. This would amount only to a promise or an agreement to make a gift. *Spencer v. Vance,* 57 Mo., 429. "To constitute a valid gift *inter vivos,* there must be an intention to give and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient unless made with an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given." *Harris Banking Co. v. Miller,* 1 L. R. A. (N. S.), 790.

It has been held that a deposit under an agreement which preserves to the depositor the right to deal with the deposit for his own benefit, but which provides that upon his death any balance standing to his credit shall be paid to the donee, though accompanied by a delivery of the deposit book to the donee, does not constitute a valid gift *inter vivos. Stevenson v. Earl,* 65 N. J. Equity, 721. A gift is incomplete if the donor "retain the dominion, or if there remain to him a *locus penitentiae,* . . . there cannot be a perfect and legal donation." *Murray v. Cannon,* 41 Md., 466. See, also, *Schippers v. Kempkes,* 12 L. R. A. (N. S.), 355, and note.

The chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis* are that the former is absolute and takes effect *in praesenti,* while the latter is revocable, and takes effect *in futuro.*

Upon the record there is no evidence tending to show any surrender, during the lifetime of the deceased, of his dominion or control over the deposit in question. Without such surrender and actual or constructive delivery to the donee, a parol gift, in law, is but a promise to give, which, being without consideration, is not obligatory. *Picot v. Sanderson,* 12 N. C., 309. "A transfer of the property is required, and an intention to give is not a gift." *Adams v. Hayes,* 24 N. C., 361.

Furthermore, there is no evidence to support the conclusion that the deceased, during his lifetime, had promised his wife that she might have the money which he had placed in bank. The only competent testimony tending to show what disposition R. C. Houston wished to make of this particular deposit, in the event he died leaving it in the bank, comes from the cashier of the Bank of Beaulaville, and the record is silent as to whether such desire was ever communicated to appellant during the lifetime of her husband. Hence there is not sufficient evidence to show an intention to make the gift, and a delivery of the thing given. Without both of these prerequisites there can be no gift *inter vivos* or *causa mortis. Newman v. Bost, supra; Medlock v. Powell,* 96 N. C., 499.

There are some decisions in our own reports, and elsewhere, to the effect that a certificate of deposit or money in bank will pass by will under the designation of "money on hand," where it clearly appears that such was the intention of the testator; but in the instant case a contrary purpose is quite apparent. All the facts and circumstances lead to a different conclusion. The testimony of the witness Potter that the testator had told him, prior to the execution of his will, what he wanted done with the money in bank was incompetent, and should have been excluded. Wills are made by testators, not by witnesses.

From the foregoing it follows that his Honor was correct in charging the jury to answer the issue, with respect to the ownership of the certificate of deposit, in favor of the executor.

After a careful examination of the entire record, and the defendant's exceptions and assignments of error, we think the ruling as indicated should be sustained.

No error.

JENNIE S. PARKER v. SEABOARD AIR LINE RAILWAY ET AL.

(Filed 16 March, 1921.)

1. **Railroads—Federal Control—Federal Agent—Director General—Parties—Statutes.**

Under the Federal statute, actions at law that would lie against a common carrier before the United States assumed control of them would also lie after the act restoring them to private control as to injuries accruing during Government control against the agent designated by the President, the damages recovered to be paid out of the revolving fund created by the act, and the Director General and the railroads are both proper parties to the action.

2. **Railroads—Crossings—Signals—Warnings—Negligence.**

Evidence that the plaintiff was injured while attempting to cross the track of the defendant railroad company about a half hour after sunset on a cloudy evening, and in a drizzling rain; that the place of the injury was a most frequented crossing in a town, and that the defendant's train was running backward without light on its advancing end, and without signal or other warning, or a flagman properly placed to give any, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence.

3. **Railroads—Crossings—Automobiles—Negligence— Evidence— Signals —Warnings.**

The plaintiff was injured while a passenger in an automobile endeavoring to cross defendant railroad company's track on a dark evening about sunset, being struck by defendant's locomotive: *Held*, under the evidence in this case it was for the jury to determine whether the defendant was negligent.

4. **Same—Lights.**

It is negligence for a railroad company's employees in charge to back its engine over a frequently used street crossing of a town after dusk without a light or other signals or warning, or without placing some one to warn pedestrians of the approach of the train.

5. **Railroads—Crossings—Negligence—Evidence—Watchmen.**

Where there is evidence tending to show negligence on the part of the railroad company's employee to give timely notice at a frequented crossing of a town of the approach of the defendant's train, which, with the other evidence, was sufficient to be submitted to the jury on the issue of defendant's negligence; it is also competent to show that this employee had been ill for a long time, and was incompetent on account of his physical infirmities.

6. Evidence—Negligence—Contributory Negligence—Burden of Proof—Railroads.

The burden of proof is upon the defendant railroad company to show contributory negligence of a passenger in an automobile, struck while endeavoring to cross its track.

7. Automobiles—Passengers—Negligence—Railroads—Crossings.

Where a passenger has been injured while attempting to cross a railroad track in a collision with defendant's train, the negligence of the driver may not be imputed to her without showing that she had control over him, or was in some way responsible for his negligent act.

8. Same—Contributory Negligence—Sudden Peril.

The plaintiff, in her action to recover damages for personal injuries alleged to be caused by the negligence of the defendant railroad company while crossing its track as a passenger in an automobile, is not barred upon the issue of contributory negligence if it is shown that the defendant's negligence had placed her in sudden peril, and she, in acting upon the direction of defendant's employee, had been compelled to do so suddenly and in an emergency that did not permit deliberation.

9. Damages—Personal Injury—Disfigurement—Humiliation.

Where there is evidence tending to show that the *feme* plaintiff had been physically disfigured on account of an injury negligently inflicted, entitling her to recover damages, testimony in her behalf, as to the measure of damages, that the injuries so received were embarrassing and humiliating to her is competent.

10. Evidence—Negligence—Cities and Towns—Ordinances.

The introduction of an ordinance of a town regulating the speed of trains backing upon the track, and properly proven, C. S., 2825, and requiring a signal light to be displayed, will not be regarded as error on appeal, when it is proven that upon the evidence in the case the jury has found, upon a trial without legal error, the negligence of the defendant's employees proximately caused the personal injury for which damages were sought in the action.

11. Automobiles—Negligence—Passengers—Railroads.

Where the plaintiff was a passenger in an automobile, and was injured by defendant's railroad train while the automobile was crossing the track, and the plaintiff had no control over the actions of the driver of the car, the only duty imposed on plaintiff was to look and listen and to warn the driver of the approaching danger. The charge of the court in this case is approved.

WALKER, J., dissenting; STACY, J., concurring in the dissenting opinion.

APPEAL from *Lyon, J.*, at August Term, 1920, of HALIFAX.

This action is brought to recover $100,000 damages for personal injuries sustained in a crossing accident at Weldon, N. C., 10 February,

1920. Action was originally brought against Seaboard Air Line Railway Company and Walker D. Hines, Director-General of Railroads, but at the trial, by consent of counsel, John Barton Payne, Director General of Railroads, as agent designated by the President under the Transportation Act, was substituted as defendant in lieu of Walker D. Hines.

Plaintiff alleges negligence in that the defendant's crossing watchman caused the driver of the automobile in which plaintiff was riding as a passenger to be stopped on the railroad track immediately in front of a train moving backward, in the dark, without a light, and without giving any signal, at a greatly frequented crossing in the town of Weldon, and in that the defendant failed to keep a proper lookout at the crossing, and failed to have a light at the rear of the train, as required by ordinance of the town of Weldon.

Plaintiff suffered the loss of both legs, one above and one below the knee, as the result of the accident.

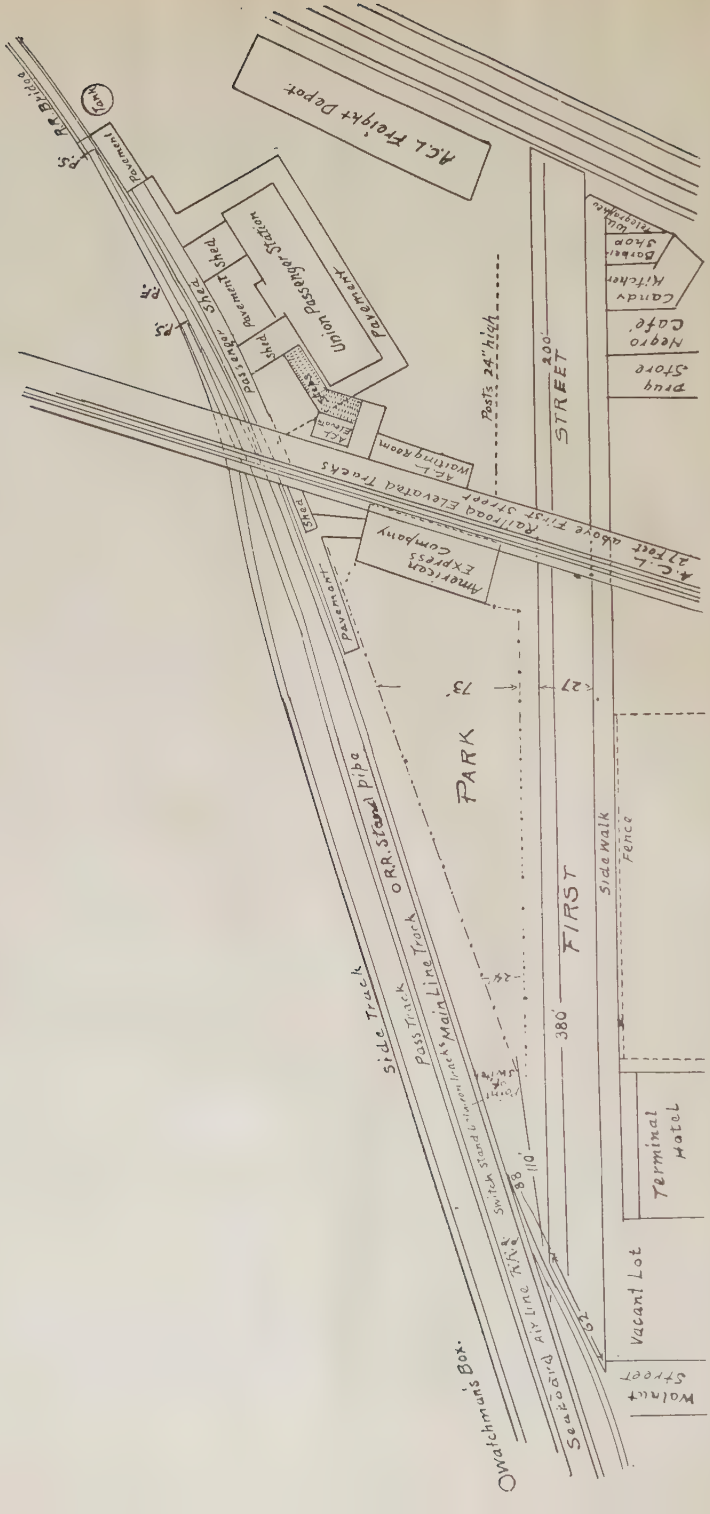
Defendants based their defense upon three theories of the case: first, that there was no negligence on the part of the defendants; second, that the plaintiff was guilty of contributory negligence; and third, that the negligence of plaintiff's sister, who was driving the car, was the proximate cause of plaintiff's injury.

The jury returned a verdict for $45,000, and defendants appealed.

Travis & Travis, Ashby W. Dunn, and Daniel & Daniel for plaintiff.
George C. Green, R. C. Dunn, and Murray Allen for defendants.

CLARK, C. J. The plaintiff was riding as a passenger in an automobile, and on 10 February, 1920, at a greatly frequented crossing, a little after six p. m., the automobile was struck by the rear car of a backing train. It was a drizzly, rainy evening, and in the automobile, besides the driver, Mrs. Scott, there was the plaintiff seated on the front seat to the right of the driver, four young ladies, and Mrs. Scott's son, when it reached the crossing in front of the Terminal Hotel in Weldon. At that point where the defendant's track crosses the street, there are four tracks which converge until the street which is the First Street in the town (and on which the party was traveling) intersects Walnut Street. Beyond the crossing the railroad and First Street extended are almost parallel with each other, going west, the direction in which the automobile was moving. Before the intersection of said First Street and the railroad the angle is very acute and the railroad was to the right of the street getting nearer and nearer until the crossing is reached.

The rear of the car had the curtains in place, but on the front seat, where the plaintiff sat, there were no curtains, she being on the right and


R.R. Bridge
Tank
P.S.
Pavement
A.C.L. Freight Depot
Shed
Shed
Pavement
Union Passenger Station
Pavement
Shed
Passenger Shed
P.F.
P.S.
Steps
A.C.L. Elevator
A.C.L. Waiting Room
A.C.L. Railroad Elevated Tracks 27 Feet above First Street
Posts 24" high
200'
STREET
W.U. Telegraphers
Barber Shop
Candy Kitchen
Negro Cafe
Drug Store
American Express Company
Shed
Pavement
73'
27'
PARK
O R.R. Stand pipe
Side Track
Pass Track
Main Line Track
Switch Stand Union Tracks
FIRST
Side Walk
Fence
380'
24
110'
88
62
Seaboard Air Line R.R.
Terminal Hotel
Vacant Lot
Walnut Street
O Watchman's Box.

the driver, Mrs. Scott, to the left. The evidence is that the car was being driven along the street slowly and came almost to a standstill, and the evidence is that both Mrs. Scott and Mrs. Parker looked across the tracks and up and down the tracks, and both testified that they were clear. As they drove along First Street going west towards the crossing, which is just in front of the hotel, the plaintiff testified she saw some freight cars standing still at the right some 400 feet, near the Union Station. Just prior to the approach of the automobile to the crossing, a freight train of 19 cars had come from the direction of Roanoke Rapids to Weldon, and had pulled up across this crossing, and then had gone on in the direction of the Union Station, and had passed the switch between the crossing and the Union Station preparatory to backing into another track, and these cars were standing still, according to the plaintiff's testimony, near the Union Station. As the automobile slowly approached the crossing these cars commenced backing towards the crossing slowly, without a light, or any one upon the advancing train to give warning.

The evidence is that the conductor had gone into the yard office to report the train, and sent out one of his brakemen, who reached the train too late. The engineer was at the other end of the 19 cars, down towards the river beyond Union Station, and knew nothing of the collision until he had put his train away. One of the brakemen, who was on the other side of the train at the switch, could not see the automobile, and the other brakeman was about half way the train and knew nothing about what was happening. According to the evidence, this was the situation as the automobile approached the crossing, which it is testified was clear. The defendant had provided a flagman or crossing-master at that point. He had formerly worked in the express office, but on account of his age and infirmities the company had retired him, and the defendant had then employed and stationed him at this point. The evidence was that he was old and infirm, and that at this crossing more vehicles passed in a day than at any other crossing in the county.

The evidence is that just as the automobile started across the track this agent appeared and cried, "Stop, stop, stop! Jump, jump, jump!" Mrs. Parker, who was on the right and nearest the car on the backing train, started to open the door and attempted to get out. One foot was on the ground and one on the running board when the forward car, moving slowly and noiselessly, struck her on the shoulder, knocked her down, ran over and crushed one of her legs just above the knee; and then the train, for some unexplained reason, moving back cut off the other leg between the ankle and the knee; her shoulder was also broken. The automobile was struck just in rear of the front wheel and pushed around. The front door was battered and the front fender bent. One

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of the young ladies was thrown over the head of another who was trying to leave the car.

The plaintiff was 44 years of age, and her normal weight before injury was 223 pounds. There was testimony as to her injuries and sufferings by physicians and others.

There is evidence that the sun set 10 February, 1920, at 5:36 p. m. This was not a scheduled train, and the crossing-master who gave the order to jump was not examined as a witness.

Both defendants assign as errors that the court refused to set the verdict aside because it was against the weight of the evidence, and because the damages were excessive, but these are matters that are not reviewable on appeal. *Edwards v. Phifer,* 120 N. C., 405, and citations in Anno. Ed.; *Trust Co. v. Ellen,* 163 N. C., 47; *Boney v. R. R.,* 145 N. C., 248, in Anno. Ed., *Cooke v. Hospital,* 168 N. C., 256.

The defendant railroad company and the Director General, John Barton Payne, filed separate answers, and the railroad company seeks to avoid liability on the ground that it was being operated by the Government.

The act of Congress to provide for the termination of the Federal control of railroads, approved 20 February, 1920, sec. 206 (a), provides that actions at law "of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President, and such action may be brought in any court which but for Federal control would have jurisdiction of the cause of action had it arisen against such carrier." Another subsection provides that final judgment shall be promptly paid out of the revolving fund created by section 210 of said act.

This exception need not be again discussed, as it has been fully considered, and we have repeatedly decided that both the Director General and the corporation itself are proper parties in such actions as this. *Clements v. R. R.,* 179 N. C., 225; *Hill v. Director General,* 178 N. C., 609, citing numerous cases. The above have been reviewed and reaffirmed since in *Gilliam v. R. R.,* 179 N. C., 508; *Vann v. R. R.,* 180 N. C., 659; *McGovern v. R. R., ib.,* 219.

The plaintiff rests her case largely upon the ground that it was dark, and the ordinances of Weldon required that there should be a "light at the rear end of the train and front end of the train at night"; and even if it was not night or not dark, the defendant failed to give timely warning, and there was evidence that there was no light at the end of train, and no notice given of the approach of the train except the warning to jump given by the defendant's crossing-master, which contributed, it would seem, if it did not cause the injury to the plaintiff. In any event, the running of the train backwards without a light, signal, or other warning of its approach was negligence. *Shepherd v. R. R.,* 163 N. C., 518, quoting numerous cases, among them *Purnell v. R. R.,* 122 N. C., 832, in which the plaintiff's intestate was killed by a backing train in the same town of Weldon, and at a short distance from the scene of this occurrence, the train backing into the depot without displaying a light from the front end of the leading car, and without a flagman to give warning. The precedents are too numerous, as quoted in *Shepherd's case,* to be again reviewed.

The evidence in the present case was that the sun set at 5:36 p. m., and that the injury to the plaintiff occurred a few minutes after 6 o'clock; that there was no light on the advancing train; that it was a cloudy evening, and drizzling rain, and that it was a most frequented crossing. It was for the jury to say whether or not it was negligence for the defendants not to have had a light on the advancing end of the train, which was running backwards. *Powers v. R. R.,* 166 N. C., 602; *McNeil v. R. R.,* 167 N. C., 396; *Dunn v. R. R.,* 174 N. C., 258. And, also, whether there was a light or not.

There was no error in admitting proof of the ordinance of the town. The ordinance did not change the law already laid down in *Purnell v. R. R.,* 122 N. C., 840. It was negligence to back the train over the crossing without a light if it was dark, or without a flagman if it was not. *Lloyd v. R. R.,* 118 N. C., 1010; *Mesic v. R. R.,* 120 N. C., 490; *Allen v. R. R.,* 149 N. C., 260. The authorities are thus summed up in *Russell v. R. R.,* 118 N. C., 1109: "A person who drives up to a crossing in a town or city where there is a custom to close the gates so as to prevent the passage of vehicles when trains are approaching, and open them when there is no danger, is not negligent if he drives upon the track, because the watchman is not on duty." The plaintiff had the right to expect the company would not omit to give the usual alarm, and is not culpable for acting upon that supposition. The watchman should have known if this train was going to back. The train had passed there a few minutes before.

The occupants of the automobile had a right to rely upon the protection that should have been given at this public crossing by a light on the front end of the backing car, or by a flagman or by a watchman, especially as there were no gates. It would seem from the evidence that when the watchman discovered that the train was backing, he did run out and give a warning by shouting to "Stop, stop"; but this must have been too late, as he added, according to the evidence, "Jump, jump, jump," and in obedience to that direction the plaintiff did jump and was injured. It was for the jury to say where the flagman was and what he did and whether he gave sufficient and timely warning. As the injunction to stop and the order to jump were given simultaneously, it must have been too late, and the train must have already reached the crossing, as the plaintiff was injured in obeying the instructions to jump. Evidently the flagman did not appear until the automobile was either on the track or near enough to it to be struck by the backing train. There was evidence that the watchman had been sick for a long time before he was given this appointment, and on account of his infirmities had been retired by his former employer, the express company. He was old and slow in his movements. There was ample evidence to submit to the jury the question as to negligence of the defendants, and it was fairly submitted to the jury, who have found it in the affirmative.

As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver, if there was any, cannot be imputed to the passenger. *Duval v. R. R.,* 134 N. C., 333; *Baker v. R. R.,* 144 N. C., 43, and citations (Anno. Ed.); *Hunt v. R. R.,* 170 N. C., 444, which distinguishes *Bagwell v. R. R.,* 167 N. C., 611, which was relied upon by the defendants; Thompson on Negligence, sec. 502; 20 R. C. L. Negligence, sec. 137; *Herman v. R. I.,* L. R. A., 1515 A, 766.

In sudden peril or emergencies while the plaintiff was "bound to take active measures to preserve herself from impending harm, she was by no means held to the same judgment and activity under all circumstances. The opportunity to think and act must be taken into consideration. And although she may not have taken the safest course or acted with the best judgment or greatest prudence, she can recover for injuries sustained upon showing that she was required to act suddenly or in an emergency, without opportunity for deliberation. It has been said that when a choice of evils only is all that is left to a man, he is not to be blamed if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty or danger at the time, and compelled to decide hurriedly." *Dyer v. R. R.,* 71 N. Y., 228; *Hamlin v. Budge,* 56 Fla., 342; *R. R. v. Tauhey,* 67 Ark., 209; *Gannon v. R. R.,* 173 Mass., 40; *Elec. Co. v. Hudgin,* 100 Va., 419. The subject is elaborately considered by *Hoke, J.,* in *Norris v. R. R.,* 152 N. C., 513-515, citing numerous cases; and especially is this so in this case, where the injunction to jump came from a watchman of the defendant. It could not be negligence for her upon the spur of the moment to act upon such direction from the servant of the defendant, even if it might have been wiser, if she had had full time for reflection, to have done otherwise.

There was no error in admitting the town ordinance, and we think it has been properly proven, C. S., 2825; and the instructions of the court in respect thereto were correct. There was sufficient evidence to go to the jury of the negligence of the defendant, and the question whether a timely warning was given was properly submitted to the jury, which found that this was not done.

Nor can we see any foundation for the defendant's objection to admission of proof that the injuries of the plaintiff were embarrassing and humiliating. The authorities are ample that this testimony was properly admitted. *Britt v. R. R.*, 148 N. C., 37; *Carmichael v. Tel. Co.*, 157 N. C., 21.

Evidence as to the physical and mental condition of the watchman was competent as tending to show negligence in having a watchman incompetent physically in that place. The exceptions to the refusal to give special instruction number five cannot be sustained, as it was substantially given in the charge.

The criticism of the charge that it is in conflict with *Kimbrough v. Hines* loses sight of the important fact that the plaintiff in this action was not the driver of the car. It was held in the *Kimbrough case* that while the law does not impose on the driver of the car the absolute duty to stop that his failure to do so may be considered by the jury on the question of the exercise of ordinary care, and that it was error to omit this element in the charge, but this principle can have no application to the plaintiff, who was a guest in the car, to whom the negligence of the driver, if any, will not be imputed, and who had no control over the car and could not stop it.

All that could be required of the plaintiff was to look and listen and to warn the driver of approaching danger, and this duty was imposed on her in the charge.

The prayers for instructions are also objectionable on the same ground in that they in effect required the judge to charge that the plaintiff could not recover if the driver of the car was negligent.

The court charged on the above phases of the case as follows:

"If you should find from the evidence that the plaintiff in approaching the crossing could have seen, by looking, this moving train and could have known the train was moving towards the crossing, by listening, and that she could have seen it in time to have requested the driver of the car to stop, and you find that if she had requested the driver of the car to stop she would have stopped in time to avoid the injury, that would be the proximate cause of the injury and not the negligence of the defendant, and you should answer the first and second issues 'No.'

"If you find from the evidence that the watchman was there with his board, and gave timely warning—the defendants contend that he told them to stop, and waved his board when they were twenty feet away, and contends that there was plenty of time in which the car could have been stopped before reaching the crossing.

"Or if you shall find that Weaver, one of the brakemen, was there at the crossing, and before the automobile got within twenty feet of the crossing he warned them of danger and told them to stop, and they disregarded such warning and drove on, the defendant company would not be liable, and you would answer the first issue 'No.'

"If you find from the evidence and by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff, by looking and listening, could have seen this moving train in time to have prevented the injury, and that her sister, Mrs. Scott, would have stopped the car if she had been requested to do so, and find that was the cause of the injury, she would be guilty of contributory negligence, and you would answer the third issue 'Yes.'

"If Mrs. Scott was guilty of contributory negligence in driving the car, her negligence would not be imputed to the plaintiff. The plaintiff is not responsible for the negligence of Mrs. Scott, unless you find that the plaintiff was negligent in not looking and listening, and not requesting Mrs. Scott to stop, and further find that Mrs. Scott would have stopped if the plaintiff had so requested.

"If you find that Mrs. Scott was negligent in driving the car, and you find that was the sole cause, the sole proximate cause of the injury, why then you would answer the first and second issues 'No.' "

As to exceptions 17, 18, and 19, it is sufficient to say that if there was warning given in time to stop the automobile, which the plaintiff's evidence contradicts, this cannot be imputed to the plaintiff. In the recent case of *Hunt v. R. R.*, 170 N. C., 444, it is said by *Hoke, J.*: "There was evidence tending to show that the driver of the automobile looked and listened before entering on the crossing, and it is held with us that it is not always, and as a matter of law, required that a vehicle should come to a stop before endeavoring to cross. *Shepard v. R. R.*, 166 N. C., 539, and *Elkins v. R. R.*, 76 W. Va., 733. Furthermore, it is held by the great weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See a learned opinion on the subject by *Associate Justice Douglas* in *Duval v. R. R.*, 134 N. C., 331, citing *Crampton v. Ivie*, 126 N. C., 894, both of these decisions being approved in the more recent case of *Baker v. R. R.*, 144 N. C., 37-44. And see, also, a valuable article on the subject in 2 Ruling Case Law, secs. 42 and 43, in which the position is also stated with approval, and *Nonn v. R. R.*, 232 Ill., 387. There is nothing in the case of *Bagwell v. R. R.*, 167 N. C., 611, that in any way militates against this position. On the contrary, the principle announced in *Crampton v. Ivie* is there expressly approved, and the verdict and judgment in favor of the railroad was sustained on the ground that, under the charge of the court, the jury had necessarily negatived any negligence on the part of the defendant."

An examination of the whole charge shows that it presented every phase of the controversy to the jury, and in some respects was perhaps more favorable to the defendant than it was entitled to have.

On careful consideration of all the exceptions, we find

No error.

WALKER, J., dissenting: There was testimony tending to show that the automobile, in which were Mrs. Scott and Mrs. Parker (the plaintiff), was being driven very slowly as it approached this dangerous crossing, which was a well known one to the driver, as she had passed over it before. Mrs. Scott herself testified: "As I came on towards the crossing where we were to cross, I slowed down my car almost to a standstill," and again she stated: "I went towards this crossing; I was going slowly, because I had just crossed some tracks. Possibly I was going along there about two or three miles an hour. When I first saw these cars I was going very slowly. I had come by express office very slowly. I always go slowly along there, for I realize the danger of the point and always slow down." The defendants' testimony tended to show that the signal to stop was given when the car was as much as twenty-five feet from the track on which the backing train moved, and it varied from that down to ten feet. Ed. Weaver testifying that Mr. Poe, who was stationed at the crossing, was waving his "stop signal," and witness hollered to them, "Look out, ladies, stop," and at that moment the car had reached a point ten feet from the pass track, on which was the train. Mr. J. S. Holliday testified that when they were told to stop the car was about twenty-five feet from the track. The testimony tends to show that several, Ed. Weaver, Mr. Poe, and J. S. Holliday, and perhaps others, signaled them to stop at short intervals from the time the car was as much as twenty-five feet distant to the time it was ten feet from the track, and even afterwards, as Mr. Poe did so until the near approach of the train compelled him to leave the track and he barely escaped to a place of safety. Ed. Weaver and Mr. Poe were close by the car when they signaled, and Mr. Holliday was about forty yards away, but everything, as he said, was in plain view.

There can be no question, if the defendants' testimony is credible, that ample warning was given to stop the car because of imminent danger ahead, as Poe had the danger signal in this hand and was waving it, and all of them at the place were frantically warning them with loud voices to stop then and there. The strong evidence that they did hear the signal was that of Mr. Holliday, who stated that he was coming from the tool-house, and when he was about forty yards distant from the crossing he first heard the signal given by Mr. Poe and Ed. Weaver. Some of the witnesses testified that they heard the watchman and brakeman "yelling" for them to stop, and L. J. Holloman that he heard some one yelling "stop" when he was about one hundred and twenty-five yards from there. Several witnesses testified that it was daylight when the accident occurred.

There is other evidence for the defendant, upon the question of timely warning to stop the car and not cross the tracks, but it is not the strength or weight of the evidence we are so much concerned with, as the fact that there was evidence that sufficient warning was given.

In view of this testimony, the defendant requested that certain instructions be given to the jury, which were refused, and exception taken thereto, and also to an instruction by the court, as follows: "If you find from the evidence and by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff by looking and listening could have seen this moving train in time to have prevented the injury, and that her sister, Mrs. Scott, would have stopped the car if she had been requested to do so, and find that was the cause of the injury, she would be guilty of contributory negligence, and you would answer the third issue 'Yes,' but unless you do so find you would answer the issue 'No.'"

The instructions rejected were as follows:

"1. If the jury shall find from the evidence that the driver of the automobile heard the warning of the crossing watchman and stopped the automobile near the track and at a place of safety, and that she then started the automobile and drove upon the track, and that plaintiff, in attempting to get out of the automobile, fell and was run over by the train and injured, the jury will answer the first issue 'No,' and the second issue 'No.'

"2. If the jury shall find from the evidence that the defendant's conductor sent the defendant's switchman, Ed. Weaver, to watch the crossing, and that Ed. Weaver was standing at the crossing as the automobile and the train approached the point of collision, and that he gave the driver of the automobile notice that a train was approaching in time for the driver to have stopped the automobile before driving on the track, the jury will answer the first issue 'No,' and the second issue 'No.'"

In view of this testimony, the judge was in error when he charged the jury that the driver of the car, as she approached the crossing, was required only to look and listen, and if she did both and neither saw nor heard the moving train, which was backing on the track, it was not negligence for her to proceed and cross the tracks. The duty to look and listen was the only one the law imposed upon Mrs. Scott or the plaintiff, as the jury would be led to infer from the instruction, whereas, we have held in *Kimbrough v. Hines,* 180 N. C., 274, that a person approaching a crossing is required to do more than merely to look and listen, as he must also exercise the care which a person of ordinary prudence would use in the same circumstances, and that the failure to stop before crossing the tracks might be considered on the question of due care, with such other evidence as bore upon the question. We also held in the *Kimbrough case* that if there was negligence of the plaintiff in the respect indicated, it would not be excused by the failure of the defendant's engineer to ring the bell or blow the whistle as a signal that the train was moving, or about to move, toward the crossing. There was evidence to support this view, for some of the witnesses said that it was daylight, and the plaintiff, as well as the driver, could have seen the train if they had looked, or heard it if they had listened, or, at least, there was evidence from which the jury could have found as much.

But his Honor charged the jury that if Mrs. Scott, the driver, was guilty of negligence, it would not be imputed to the plaintiff, unless the plaintiff was negligent in not looking and listening, and not requesting Mrs. Scott to stop the car, and the jury find that Mrs. Scott would have complied with the request. There are two objections to this instruction: (1) It should have been qualified by the further instruction that if Mrs. Scott was negligent, and this was the sole proximate cause of the injury, the plaintiff could not recover, and the jury should answer the first issue "No," as in that case the plaintiff would be bound by Mrs. Scott's negligence, though she was a mere guest in the car. *Crampton v. Ivie,* 126 N. C., 894; *Bagwell v. R. R.,* 167 N. C., 611; 2 R. C. L., 1205. The negligence of Mrs. Scott would not be imputable to plaintiff only if it united with defendant's negligence to cause the injury. If it was itself the proximate cause of the wrong to plaintiff, the doctrine of imputable negligence had no application whatever, and the instruction must have misled the jury. (2) But the judge further stated in this instruction, and two others, that if the plaintiff would have seen or heard the moving train from her side of the automobile, if she had looked and listened, in time to have prevented the injury, and Mrs. Scott would have stopped her car if plaintiff had requested her to do so, and the jury find that this was the cause of the injury, it would be negligence on her part, and they should answer the first issue "No," and the second issue "Yes." If the plaintiff knew the train was backing towards them, it was her duty to have warned the driver, Mrs. Scott, and requested her to stop the automobile, regardless of whether she would have done so or not. If she could have seen or heard the train moving had she looked and listened and she failed to look and listen she was negligent, as the car was approaching a railroad crossing, which is a place of danger always, where trains are continually passing. There was no positive evidence to show that Mrs. Scott would have stopped, but the law of self-preservation raises a strong presumption that she would instinctively have done so. But the learned judge, as it appears, confused the doctrine of imputable negligence with the independent negligence of the plaintiff herself, whereas, they are two quite different things in the law. As we have already said, whether Mrs. Scott's negligence was imputable to the plaintiff depended upon whether it was concurrent with that of defendant, and if so, it was not so imputable. If Mrs. Scott's negligence was the sole proximate cause, the negligence of the plaintiff, if any, was a negligible quantity, as Mrs. Scott's negligence in that case would alone be sufficient to defeat plaintiff's recovery; that is, if it was the sole proximate cause of the injury, and his Honor so instructed the jury, but not in connection with or as a qualification of his previous instruction just commented upon. The jury could not, therefore, tell which one was correct. *Edwards v. R. R.,* 132 N. C., 99.

But, however the case may be so far, the instruction that the jury should answer the first issue "Yes," if the defendant had a watchman at the crossing, and he failed to give timely warning of the moving train, and no other warning or signal was given by bell or whistle, or otherwise, until the plaintiff was too near the track for it to avail her, and this was the proximate cause of the injury, was erroneous. This instruction entirely excluded such notice or warning of the approaching train as plaintiff or the driver would have acquired by looking and listening, or by otherwise exercising the care of an ordinarily prudent person before crossing so dangerous a place as every one described it to be. We must keep in mind that the jury were instructed to answer the first issue "Yes," if the particular warnings enumerated in the instruction were not given.

It also excluded from consideration the notice she would have received from stopping if under the circumstances an ordinarily prudent person would have done so at such a dangerous crossing as the plaintiffs themselves admit it is, and as this Court describes it. But it cannot be successfully questioned that it was error to make the plaintiff's exercise of proper care depend upon what her sister and companion, who was driving the car, would have done. She should have performed her part without regard to her sister's conduct, and then she could well acquit herself of any blame. Her sister's negligence cannot be imputed to her, and would not affect the case adversely to her unless it was the sole proximate cause of the injury to her. There is no statute of this State abolishing grade crossings or requiring gates to be maintained at them to prevent accidents of this kind. This is a matter of public policy, and is peculiarly within the province of the Legislature to deal with, but even the absence of gates does not excuse the failure to look and listen in proper cases, and there was evidence that it was daylight, and the photograph tends to show that the train could have been seen by the exercise of ordinary care, and the *Kimbrough case* (180 N. C., 274) requires that the driver of the car should look and listen and stop if necessary for safety in crossing.

The question as to whether the plaintiff exercised proper care when she jumped from the car was for the jury, even though she was confronted by a sudden peril. She must have acted as a person of ordinary care would have done in similar circumstances.

As to the Federal statute: This act of Congress was passed when the railroads were returned to the owners in 1920, and this action was brought since its passage. The act of 1920 requires that all suits be brought against the agent appointed to represent the Government and not otherwise, and that any judgment recovered shall be paid out of the revolving fund. The railroad company is not a necessary or proper party under this act, the Government's agent being the only defendant. There was a perfectly good reason for this change. The Government thereby assumed sole responsibility for all damages sustained during its administration, and provided a fund to pay them, and a speedy method of collection. The cases, therefore, which are cited in the opinion of the Court have no application, as they were based entirely upon prior statutes, and the act of 1920 was not considered by any of them. It would, therefore, seem that the action should have been brought against the Federal agent and not against the company, as the agent is constituted the sole defendant. *Lanier v. Pullman Co.,* 180 N. C., 406, refers to this method of adjustment, but does not refer specifically to the act of 1920, as the question was not involved in that case.

In our opinion the action should be dismissed as to the railroad company, or, at least, that, as there was material error, there should be a new trial.

STACY, J., concurring in dissent.

H. N. CLARK v. H. G. BLAND, ATLANTIC COAST LINE RAILROAD COMPANY, AND DIRECTOR GENERAL OF RAILROADS.

(Filed 23 March, 1921.)

1. **Corporations—Principal and Agent—Torts.**

Corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees, when committed in the course and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person, growing out of the conditions existing between them, an instance of this last rule of liability not infrequently presented from the relationship of carrier and passenger.

2. **Same—Evidence—Nonsuit—Trials.**

Upon a motion to nonsuit, the evidence which makes in favor of plaintiff's claim must be accepted as true, and construed in the light most favorable to him, and defendant's evidence *per contra* will not be considered.

3. **Carriers of Passengers—Railroads—Passengers—Evidence—Questions for Jury—Trials.**

Evidence that the plaintiff went to the defendant railroad company's passenger depot for the purpose of becoming a passenger on the defendant's next train, about an hour before schedule time, then open for the reception of passengers, and waited for the opening of the ticket office, which was customarily done a quarter of an hour before train time, is sufficient for the jury to find that during this time the relation of carrier and passenger existed between the parties.

4. **Same—Reasonable Time.**

Where a person goes to the passenger depot of a railroad company, open for his reception for the purpose of taking a train, before the customary time for the ticket office to open, the custom as to the time of defendant to open its ticket office is not controlling on the question whether the person has entered the station "within a reasonable time before the departure of his train," but it may be considered with the other evidence tending to show he had done so.

5. **Carriers of Passengers—Railroads—Duty to Passengers—Protection.**

A railroad company is held to a high degree of care in protecting its passengers from violence and insult, and may be held liable for injuries inflicted in breach of this duty on the part of their employees, and of others also which it could have prevented in the reasonable and proper performance of this duty.

6. **Same—Principal and Agent—Punitive Damages.**

Where in breach of the duty of a railroad company to protect its passengers, injuries are inflicted on the passenger by the company's employees willfully and of malice, or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury.

7. **Same—Liability of Carrier—Agency—Evidence—Trials.**

Where railroad agents are to be changed at a station, and the one leaving has remained to help or instruct the other in his duties there, he may properly be considered the agent of the railroad company for that time, whose failure to discharge the carrier's duty to protect its passengers will subject the carrier to the payment of actual damages, and under proper circumstances, with punitive damages, to be awarded in the discretion of the jury.

8. **Carriers of Passengers—Railroads—Relation of Passenger—Depot Premises—Assault—Principal and Agent.**

In order to come within the duty of a railroad company to protect one in the relation of a passenger, it is not always required that the person

should remain continuously in the carrier's coach or on the carrier's immediate premises, and evidence that the local agent of the railroad called a passenger off its premises ostensibly for another purpose, but in fact for the purpose of an assault, without the passenger's knowledge of this purpose, and then assaulted and injured him, just beyond the depot premises, is sufficient to take the case to the jury upon the question of the relationship of the injured person to the carrier as a passenger.

APPEAL from *Devin, J.*, and a jury, at June Term, 1920, of HALIFAX.

The action is to recover damages for an unlawful and wrongful assault and battery on plaintiff by defendant, H. G. Bland, and in which plaintiff seeks to hold defendant company liable by reason of the fact that plaintiff was a passenger of defendant road, and that Bland was an employee of the company at the time, and that the assault was made and injuries inflicted under circumstances that rendered the company, etc., responsible for his wrongful conduct. There was denial of liability on the part of the company and Director General, who insisted that Bland, while an employee, was not on duty at the time and place of the occurrence, and that these defendants were in no way liable for his acts. On issues submitted, the jury rendered the following verdict:

"1. Did the defendant Bland unlawfully assault the plaintiff, as alleged? Answer: 'Yes.'

"2. Did the defendants, Atlantic Coast Line Railroad and Walker D. Hines, Director General of Railroads, through their agent, unlawfully assault the plaintiff, as alleged? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover therefor? Answer: '$2,250.'"

Judgment on verdict for plaintiff, and defendants other than Bland excepted and appealed.

J. Crawford Biggs, D. M. Clark, and Daniel & Daniel for plaintiff.

F. S. Spruill, R. C. Dunn, and F. E. Winslow for defendants other than H. G. Bland.

HOKE, J. It is now fully recognized that corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees, when committed in the course of and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person, growing out of the conditions existent between them, an instance of this last rule of liability being not infrequently presented from the relationship of carrier and passenger. *Cotton v. Fisheries Product Co.*, 177 N. C., 56-59, citing *Cooper v. R. R.*, 170 N. C., 490; *Seward v. R. R.*, 159 N. C., 241; *Sawyer v. R. R.*, 142 N. C., 1; *Jackson v. Tel. Co.*, 139 N. C., 347; *Hussey v. R. R.*, 98 N. C., 34; *Bank v. Graham*, 100 U. S., 699; *R. R. v.*

Quigley, 62 U. S., 202; *Palmeri v. R. R.,* 133 N. Y., 261; *Maynard v. Fireman's Fund Ins. Co.,* 34 Cal., 48.

It is on this ground that liability has been fixed on appellants in the case before us, and we find no good reason for disturbing the results of the trial. It is objected to the validity of plaintiff's recovery that the court refused defendant's motion of nonsuit, and this principally on the ground that there is no evidence of legal significance that the relationship of carrier and passenger existed between the parties at the time. Second, that there was error in allowing the jury to consider the question of punitive damages, but in our opinion neither position can be maintained. On the motion to nonsuit there was evidence on the part of plaintiff tending to show that on 27 March, 1919, plaintiff went to the railroad station of defendant company at Norfleet, N. C., for the purpose of becoming a passenger on the next train of the company going towards Kelford, the next station on the road; that plaintiff went to the station, which was then open for reception of passengers, about an hour before schedule time, which was 10:20 a. m.; that defendant Bland and one O. W. Parker were in the regular railroad office at the time, apparently engaged in some official work; that plaintiff inquired for an express package he was expecting, and after and while waiting for the ticket window to open, which was usually done about fifteen minutes before the arrival of trains, plaintiff stepped into station yard about five feet from office, and while there Bland and Parker came out and passed plaintiff going towards the store of Moses Moore, which abutted on the station premises. As they passed Parker asked plaintiff to come on and have a drink. That soon Bland, while standing about forty steps away in the direction of the store and in the station yard, called to plaintiff to "come over here, I would like to speak to you." Plaintiff went to him, when Bland asked plaintiff why he had told that Bland was selling whiskey. Plaintiff replied that he didn't recall having said anything about that. Bland said to plaintiff: "Didn't you tell Captain Haley that I had been peddling whiskey on the streets of Kelford?" Plaintiff replied "No"; when Bland called him a "God-damned liar," and picked up a heavy stick three feet long and hit plaintiff several times with it over head and shoulders, etc. That plaintiff tried to make defense, but was too much stunned and crippled by the blows with the stick; that plaintiff went up on platform of the store to get something to protect himself, and Bland followed. They clinched and fell off the porch. That during the occurrence Bland, who was at the time station agent of the company at Norfleet, continued to curse and abuse plaintiff, and in the assault inflicted protracted and painful injuries upon him.

Considering this statement under the rule which uniformly prevails in this jurisdiction, that on motion to nonsuit the evidence which makes in favor of plaintiff's claim must be accepted as true, and construed in the light most favorable to him, *Lamb v. R. R.,* 179 N. C., 619, and authorities cited, the facts clearly permit the inference that plaintiff was a passenger of defendant company on this occasion, and that under the circumstances presented the company is liable for the misconduct of Bland, their agent and codefendant.

There was evidence on the part of defendant tending to show that plaintiff had come to the station and made inquiry of its agent at or near eight in the morning, more than two hours before the schedule time for the train; that plaintiff had said nothing of his purpose of becoming passenger, and that he knew of the custom not to open the ticket window till fifteen minutes before schedule time for train. Defendant's evidence further tended to show that Bland was not the agent at Norfleet at this time, but had surrendered the keep and control of the station the afternoon before to O. W. Parker, the new man at Norfleet, and with view of becoming agent at Kelford, the next station on the line, and that if Bland was at or about the station on that occasion at all that day he was there only for the purpose of assisting Parker, the new agent, to take up the work, and that he was otherwise without authority or duty at Norfleet; and further, that the fight was not on the company's premises proper, but commenced on the platform of the store. On the motion to nonsuit, this testimony coming from defendant could not properly be considered, and as to plaintiff's being a passenger, the question on the conflicting testimony was submitted to the jury, with the instruction, among other things, that, "If plaintiff Clark went to said railroad at Norfleet upon this occasion to take the next train for Kelford, and went to the station at Norfleet in a reasonable time before the time for the arrival of the train, though he had not purchased a ticket, he is in contemplation of law a passenger, and the duties imposed by the relation of carrier and passenger would be obligatory on the railroad," etc., a position that is fully supported by the decided cases with us, and by the authorities generally on the subject. *Thomas v. R. R.,* 173 N. C., 494; *Seawell v. R. R.,* 132 N. C., 856-859; *Tillett v. R. R.,* 115 N. C., 665; *Hansley v. R. R.,* 115 N. C., 603; *Kidwell v. Chesapeake & Ohio R. R.,* 71 W. Va., 664; 4th Elliott on Railroads (2 ed.), sec. 1579; 4th R. C. L., pp. 1029-30, title Carriers, sec. 489. In a note to the *Kidwell case,* reported also in 43 L. R. A., sec. IV, at p. 999, it is said to be the general rule sustained by the great weight of authority that a person who goes to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is in a reasonable time before the departure of the train, citing numerous cases. And in 4th Elliott the author says: "A person may become a passenger before he has entered the train or vehicle of the carrier. We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such place is open for the reception of persons intending to take passage on the train of the company." The evidence as to a custom not to open the ticket window until fifteen minutes before schedule time for trains, while evidential, is not at all controlling on the question whether the person enters the station "open for his reception, and within a reasonable time before the departure of his train." The jury, under a correct charge, having accepted the view that the relationship of carrier and passenger existed between plaintiff and defendant company, the authorities are very generally to the effect that the corporation is held to a high degree of care in protecting plaintiff from violence and insult, and may be held liable for injuries inflicted in breach of this duty on the part of their employees, and of others, also, which it could have prevented in the reasonable and proper performance of their duty. *Lanier v. Pullman Co.,* 180 N. C., 406; *Williams v. Gill,* 122 N. C., 967; *Daniel v. R. R.,* 117 N. C., 592; *White v. R. R.,* 115 N. C., 631; *Britton v. R. R.,* 88 N. C., 536; *Birmingham, etc., v. R. R. Co.,* 130 Ala., 334.

And these and many other cases in this jurisdiction hold that when such injuries are inflicted willfully and of malice or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury. *Lanier v. Pullman Co., supra; Huffman v. R. R.,* 163 N. C., 171; *Williams v. R. R.,* 144 N. C., 498; *Hutchinson v. R. R.,* 140 N. C., 123; *Strother v. R. R.,* 123 N. C., 197.

Appellants except further that as to the exact point where the difficulty took place, the court instructed the jury in effect that, "If plaintiff, being on the railroad premises and on business with the company, as claimed, was called off by an employee of the railroad to a point a short distance away, and for the purpose of a personal difficulty, and was there assaulted and beaten, the same rules would apply whether the point at which the assault took place was just on or off the premises of the company"; but we think this is undoubtedly a correct ruling. The evidence is clearly to the effect that either Bland was the company's agent at the station, or, being an employee of the company, he was there assisting the new agent in his duties, this last position seems to be recognized in the brief of counsel, and in such case he would be charged in part with extending to plaintiff the protection owing to him as a passenger, and under such circumstances, if he called plaintiff from the premises for the purpose of assaulting him, and did assault him as claimed, just beyond the line, the breach of duty might well be considered as commencing at the time of the call. Assuredly so if the plaintiff had no notice or warning of the agent's wrongful purpose, and in any event on the facts presented, plaintiff would still be within the sphere of protection owing to him as the company's passenger at the time, for the principle by no means requires that the passenger should remain continuously in the company's vehicles nor on the immediate premises. *Wallace v. R. R.,* 174 N. C., 174; *Palmer v. R. R.,* 131 N. C., 250. In this last case, the present *Chief Justice* states the principle applicable as follows: "If plaintiff had been a passenger, or his passage had not fully terminated, or if when he left his car at his destination the employee had immediately followed the passenger up and assaulted him, defendant concedes that there would be no question as to the liability of the company," citing *Daniel v. R. R.,* 117 N. C., 592; *Williams v. Gill,* 122 N. C., 967; *Strother v. R. R.,* 123 N. C., 197.

We were referred by counsel to the case of *Stewart v. Lumber Co.,* 146 N. C., 47, as an authority against the award of punitive damages in the present instance, but we do not so consider it. That was a case where a traveler along the highway sought to impose liability on the company by reason of the willful wrong of its engineer in blowing the engine whistle for the purpose of frightening plaintiff's mule, causing it to run away and injure plaintiff. It will be noted that plaintiff there was an outsider or third person, and the breach of an independent duty owing directly from the company to claimant was in no way presented or involved. The claim depended entirely on principles of agency or the relationship of master and servant alone. The distinction adverted to is pointed out in *Sawyer's case,* 142 N. C., p. 1, as follows: "According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company, and sometimes the facts present an additional element and involve some independent duty which the corporations may owe directly to the injured or complaining party."

In our case this additional element is present, the suit being for a breach of duty growing out of the relationship of carrier and passenger, and by an agent of the company charged in part with performance of the duty of protection and care of plaintiff, and in such case the authorities in this jurisdiction uphold the award of punitive damages where, as stated, the wrong is done willfully and under circumstances of insult, rudeness, or oppression. Thus in *Huffman v. R. R., supra,* it was held "that defendant railroad company was liable in punitive damages for willful and malicious abuse of a female passenger, traveling on his train, occasioned by her not having purchased a ticket for a nine-year-old child traveling with her."

In *Williams v. R. R.,* 144 N. C., 498, "That defendant company is liable for punitive in addition to compensatory damages for willful refusal to stop a train at a flag station," etc. And in *Hutchinson v. R. R.,* "That in a question of punitive damages, the court correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried plaintiff past her station, or if he maliciously or wantonly mistreated or humiliated her, they could assess punitive damages." And so here it was proper to submit the question of punitive damages to the jury on evidence tending to show an unlawful and malicious assault on plaintiff, who was on the premises of defendant as a passenger, and by an agent or assistant agent of the company, who was charged in part with the duty of the protection due plaintiff from the company as its passenger.

We were also cited to *Lake Shore, etc., R. R. v. Prentice,* 147 U. S., 101, where it was held that a corporation is not liable to exemplary or punitive damages for a willful or malicious tort on the part of its employee or agent unless such tort directly was authorized or ratified by the company. It is recognized, however, in that opinion that in many of the states the liability of corporations for punitive damages is not so restricted, and on the facts of this record the rule is clearly otherwise in this jurisdiction.

On careful consideration we find no error in the record, and are of opinion that the judgment for plaintiff, establishing liability of defendant company, should be affirmed.

No error.

CLARK, C. J., did not sit.

JOHN D. HOWELL v. J. H. PATE.

(Filed 23 March, 1921.)

1. **Verdict—Doubtful Meaning—Appeal and Error.**

   When, by reference to the pleadings, evidence, and the charge of the court, the true intent and meaning of the verdict of the jury is found doubtful, uncertain, and ambiguous, a new trial will be ordered on appeal.

2. **Contracts—Breach—Damages—Lands—Vendor and Purchaser.**

   The measure of damages for the breach of the vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest.

3. **Contracts, Written—Land—Equity—Contracts to Convey—Breach—Evidence.**

   Time is not of the essence of a contract to convey land, and it is competent for the purchaser to show that he had tendered the balance of the purchase price in accordance with a parol agreement made between the parties before and after the time specified in the writing, and the statute of frauds has no application.

APPEAL by plaintiff and defendant from *Devin, J.,* at October Term, 1920, of WAYNE.

Civil action for damages, tried upon an alleged breach of the following contract:

GOLDSBORO, N. C., 6 October, 1919.

I agree to make John D. Howell a deed for the 27 acres of land that I bought from Willie B. Pate when he pays me, on 1 January, 1920, the balance of purchase price, $6,500, he now paying me $500 to bind said trade. J. H. PATE.

Witness: JOHN D. HOWELL.

It appears from the pleadings that the $6,500 stipulated in the contract to be paid on 1 January, 1920, was not tendered until 6 January, 1920. But in this connection it is alleged that on 6 October, 1919, after the execution of the contract, and again later, the defendant orally agreed to extend the time of payment for a period of two weeks.

Defendant moved for judgment on the pleadings. Motion overruled, and exception.

Upon issues joined, the jury rendered the following verdict:

"1. Was the plaintiff prevented from paying the purchase money for the Pate land on 1 January, 1920, by reason of the agreements and representations of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover of the defendant for failure to convey said land? Answer: '$500.' "

Plaintiff tendered judgment for $500 on the verdict, and for $500 with interest from 6 October, 1919, to cover the initial payment on the contract, which was admitted in the pleadings to have been made and not refunded. His Honor declined to sign judgment tendered by plaintiff, and entered judgment on the verdict for $500 and costs.

Both plaintiff and defendant excepted, and appealed.

Kenneth C. Royal for plaintiff.
Langston, Allen & Taylor for defendant.

PLAINTIFF'S APPEAL.

STACY, J. Upon the entire record, considering the evidence, the charge of the court, and the verdict, it is not sufficiently clear for us to say whether or not the partial payment of $500, made at the time of the execution of the contract, was considered and taken into account by the jury in answering the issue of damages. By reason of this uncertainty we have decided to send the case back for a new trial.

It has been held with us in a number of cases that a verdict may be given significance and correctly interpreted by reference to the pleadings, the evidence, and the charge of the court. *Reynolds v. Express Co.,* 172 N. C., 487; *Bank v. Wilson,* 168 N. C., 557, and *S. v. Murphy,* 157 N. C., 615. Thus it would appear that a new trial should be awarded when, upon a proper perusal and examination, the true intent and meaning of the verdict is found to be doubtful, uncertain, and ambiguous. *Donnell v. Greensboro,* 164 N. C., 330.

"The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest." Hale on Damages, p. 364; *Nichols v. Freeman,* 33 N. C., 99; *LeRoy v. Jacobsky,* 136 N. C., 443; *Hopkins v. Lee,* 6 Wheat., 109.

DEFENDANT'S APPEAL.

Defendant moved for judgment on the pleadings, which was overruled; and this is the only point raised on his appeal. Defendant took the position that the paper-writing above set out was an option, and that the oral agreement to extend the time of payment for a period of two weeks was such a covenant as is required to be put in writing, under the statute of fraud. Holding, as we do, that the instrument, which forms the basis of this action, is a contract to convey land and not an option, it follows that his Honor's ruling on defendant's motion was correct.

The agreement contains the necessary elements of an executory contract, to wit: mutuality of obligation and remedy. *Pollock v. Brookover,* 6 L. R. A. (N. S.), 403; *Davis v. Martin,* 146 N. C., 281. As said in *Davis's case:* "There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and, therefore, time is not of the essence of the contract; but where the contract is merely an option, generally without consideration, of course time is of the essence."

The true character of the instrument is manifest from its recital of $500 "to bind said trade," evidently meaning a part of the purchase money, as the $6,500 is called "the balance of purchase price."

On plaintiff's appeal, New trial.

On defendant's appeal, No error.

ALLEN, J., dissenting: No error is pointed out in the opinion of the Court, and I see no uncertainty in the verdict. The amount of damages awarded by the jury is easily understood when considered in connection with the evidence, as it appears that the contract price for twenty-seven acres of land was $7,000, and the opinions of the witnesses as to the value of the land at the time of the breach ranged from $200 to $400 per acre.

I think it is clear that the jury concluded that it would be a fair and just settlement for the defendant to return to the plaintiff the amount he had paid, and that this ought to be a settlement of the controversy.

W. M. ALLEN v. BENEHAN CAMERON.

(Filed 23 March, 1921.)

1. **Wills—Interpretation—Intent—Residuary Clause—Presumptions.**

The purpose of a residuary clause in a will is to embrace both real and personal property not therein specifically devised or bequeathed, and unless words are used to restrict its meaning, this interpretation will be adopted as carrying out the intent of the testator.

2. **Same.**

A testator owning a large estate in real and personal property, after making devises and bequests thereof, and to provide for any omission, with apparent particularity declared his daughter the residuary legatee, "to receive and take all that shall be omitted, or shall fall in and become mine, either in law or equity, and that she shall be paid her full child's part on the division of my personal property, without deduction for any advances, as she has needed none and received nothing beyond what she deserved," etc.: *Held*, a lot of land not specifically devised comes within the terms of the residuary clause, and evidenced the testator's intent from the language employed as well as from the presumption of law, that as to the land specified he should not die intestate, and that the daughter should not be charged with any advancements whatsoever.

3. **Same—Devise—Bequest—Realty—Personalty.**

The general rule of interpretation of a residuary clause in a will is that the word "legacy" may include "devise" and "legatee," a "devisee" applying to both the testator's realty and personalty when from the writing of the will the testator's intent so appears.

APPEAL by plaintiff from *Kerr, J.*, at November Term, 1920, of WAKE.

This is a civil action, brought by plaintiff, W. M. Allen, against defendant, Bennehan Cameron, for the specific performance of a written contract, whereby Mr. Cameron agreed to sell to W. M. Allen, and said

Allen agreed to buy from him a house and lot in Raleigh, N. C., on East Jones Street, at the price of $8,000 in cash. The defendant Cameron in apt time tendered the deed from him and his wife to said Allen, and demanded the payment of the sale price of $8,000. Mr. Allen made no objection to the form of the deed, or that the property was not free from encumbrance, but refused to accept the deed, or to pay the sale price, solely on the ground that item 16 of the will of Mr. Paul C. Cameron did not pass said house and lot to his daughter, Mildred Cameron, who devised the same to defendant, Bennehan Cameron, and hence that the defendant, Bennehan Cameron, did not have and could not convey a good title to said house and lot, the said Allen contending that the words "residuary legatee" in item 16 passed undisposed of personal property alone, but did not pass undisposed of real estate; while the defendant Cameron claimed that item 16 passed undisposed of real estate also, including the house and lot in question. The house and lot was owned by Paul C. Cameron at the time of his death, but is not specifically mentioned in his will, and there is no other residuary clause in the will, except item 16. Mr. Paul C. Cameron wrote his own will.

Item 16 of the will of Paul C. Cameron is as follows:

"Item 16. And to provide for any omission I name and declare my daughter, Mildred Cameron, the residuary legatee, to receive and take all that shall be omitted, or that shall fall in and become mine, either in law or equity, and that she shall be paid her full child's part on the division of my personal property, without any deduction for any advances, as she has needed none and received nothing beyond what she deserved for her care of her parents, and as a member of my family."

The court below rendered judgment in favor of the defendant, and held that item 16 of the will of Paul C. Cameron did pass the house and lot to Mildred Cameron, and that her will devised the same to the defendant Bennehan Cameron, and, therefore, that he was the owner in fee simple of the same, and that upon his tendering to the plaintiff a deed in sufficient form to pass title in fee to the house and lot free from encumbrances, the plaintiff should accept the same and pay the sale price of $8,000 over to the defendant.

The plaintiff excepted and appealed, and filed six exceptions and assignments of error, set out in the record. All of plaintiff's exceptions and assignments of error are based upon his contention that the court erred in holding that item 16 of the will of Paul C. Cameron operated to make his daughter, Mildred Cameron, his residuary devisee as well as residuary legatee, and that the house and lot passed to her, it being conceded that if she acquired the title to the house and lot, it passed by her will to the defendant, and that he is now the owner in fee of the same, and that the deed already tendered by him is fully sufficient to convey the house and lot to plaintiff in fee. Therefore, all of plaintiff's exceptions and assignments of error will be considered together.

The only question is as to whether item 16 of the will of Paul C. Cameron passed to his daughter, Mildred Cameron, the undisposed of real property as well as the undisposed of personal property.

R. N. Simms for plaintiff.
Ernest Haywood for defendant.

WALKER, J., after stating the case: We have no doubt as to what Mr. Cameron meant by the language employed in the residuary clause of his will. It is clear from the preamble, or introductory clause, that he intended to dispose of all that he owned or possessed, and not die intestate as to any part of his large estate. He disposed of the larger part of it with great care and particularity, and when he came to the final clauses, thinking that he may have inadvertently overlooked some part of it, he inserted the residuary clause to provide for any such omission on his part. This is generally the intention of a testator in making such a provision, and is the peculiar office of a residuary clause. It will embrace anything not before disposed of in the will, both real and personal property, unless there are words used to restrict its meaning. Perusing the entire will of Mr. Cameron, and comparing all of its parts with each other, we are led to the conclusion that he has expressed his intention throughout with unusual clearness and precision with the clear understanding of the other parts of his will, in which he provides for all those whom he regarded as the proper objects of his bounty and solicitude, he then takes precaution against the contingency of anything being left out, which shows additionally that he intended to dispose of everything he had, and this also is according to the presumption of fact which the law raises, for *Chief Justice Ruffin* said, in *Reeves v. Reeves*, 16 N. C., 386: "It is to be remembered that every testator is presumed not to intend to die intestate, as to any part of his estate; and, therefore, that a residuary clause is always, unless expressly restrained, held to pass whatever is not otherwise disposed of. If there was nothing particular, therefore, in this will, there could be no question." See, also, *Powell v. Woodcock*, 149 N. C., 235; *Austin v. Austin*, 160 N. C., 367; *Homes v. Mitchell*, 6 N. C., 228; *Williams v. McComb*, 38 N. C., 450; *Page v. Foust,* 89 N. C., 447; *Foil v. Newsome*, 138 N. C., 115; *Jones v. Myatt,* 153 N. C., 225; *Norris v. Durfey*, 168 N. C., 325. Cases in other jurisdictions are to the like effect. *Wilson v. Wilson*, 261 Ill., 174; *Russell v. Elden*, 15 Me., 193; *Bacon v. Bacon*, 55 Vermont, 243; *Yopp v. R. R.*, 148 Ga., 539. *Justice Story,* in *Burwell v. Cawood,* *Executor of Mandeville,* 2 Howard (U. S.), 560, 578 (11 L. Ed., 378, 385), considered a case very much like ours and thus said, after referring to certain legal principles and to the testator's intention, as disclosed by his will, when read in the light of these principles. There can, we think, be no doubt that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words to his will already cited show such an intention in a clear and explicit manner. He, therefore, looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect; because the residuary clause declares John West his "residuary legatee" only, and not his residuary devisee also; and that we are to interpret the words of the will according to their legal import as confined altogether to the residue of the personal estate. "This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskilled man, and not versed in legal phraseology. The cardinal rule in the interpretation of wills is that the language is to be interpreted in subordination to the intention of the testator, and it is not to control that intention, when it is clear and determinate. Thus, for example, the word 'legacy' may be construed to apply to real estate where the context of the will shows such to be the intention of the testator." He then cites some of the English cases. *Hope v. Taylor* (1 Burr. Rep., 269), where the word "legacy" was held to include lands, from the intention of the testator deduced from the context of his will; and *Hardacre v. Hash* (5 Term Report, 716), where a like doctrine was announced upon similar facts; *Doe, dem, Tofield v. Tofield* (11 East., 246), and *Pitman v. Stevens* (15 East., 505), were to the same effect. He treats the law as settled upon this point. The above English decisions have been followed by the courts of this country, and especially by this Court. We may, therefore, take the general rule to be unquestioned, that where it appears to be the intention of the testator, the word "legacy" may include "devise," and "legatee" a "devisee," so that a "residuary legatee" would take land as well as personalty. In the following cases the word residuary legatee was used by the testator, and held by the Court to have the same meaning as if they had been "residuary legatee and devisee." *Evans v. Crosbie,* 15 Sim., 600; 60 Eng. Rep., 753; *Estate of Henderson,* 161 Cal., 354; *Dann v. Canfield,* 197 Mass., 591; *Day v. Daveron,* 12 Sim., 200 (59 Eng. Rep., 1108); *Wilds v. Davies,* 1 Smale & Giffard, 475 (65 Eng. Repr. Rep., 208); *Laing v. Barbour,* 119 Mass., 523; *Singleton v. Tomlinson,* 3 Appeal Cases, 404. So it is seen that the current of authority is decidedly in one and the same direction. But the language of the residuary clause is itself sufficient to show the intention of the testator. He first declares that he wishes "to provide for *any* omission," and therefore appoints his daughter, Mildred Cameron, his "residuary legatee"—"to receive and take *all* that shall be omitted or that shall fall in (or lapse) and become mine." Nowhere does he restrict this gift to personal property, but uses general words, such as "any" and "all," which included his property of every kind not expressly given to another, or which reverts to him by reason of a lapse on account of the death of any beneficiary during his lifetime. He could not have written a more inclusive or comprehensive clause. The subsequent reference to her child's part in the division of the personalty (already provided for) was inserted in order to make it clear that he intended that the daughter should be treated with special favor, and that there should be no deduction from her child's share in the personalty when the division of it was made as before directed, on account of any advancement he had made to her. The latter part of the clause was not intended to limit the words of the first part by confining the latter to personalty alone, but was inserted there for a very different purpose. He assigns the reason for thus favoring his daughter, which is, that no real advancements had been made, "as she had needed none, and had received nothing beyond that she deserved for her care of her parents and as a member of my (his) family." There can be no doubt as to the true construction of Mr. Cameron's will, if there was room for it. Where the meaning is plain, or without any ambiguity, no construction is required, but we simply enforce the intention as it is clearly expressed, and for this reason further discussion would be useless, and we would end it here but for the fact that this Court has once passed upon this will some years ago, in construing another clause of it, and in the opinion of the Court reference also was made to this residuary clause, which is pertinent to this case and deserves some attention from us. The Court there said: "It is a presumption of fact that every man that makes a will intends to dispose of all of his estate. *Blue v. Ritter*, 118 N. C., 580; *Jones v. Perry*, 38 N. C., 200. This presumption may be rebutted, but it stands until it is rebutted. It is therefore presumed that Mr. Cameron did not intend to die intestate as to this large body of land, amounting to some 800 acres. And, besides this presumption the law makes, we have other evidence in the will tending to show that he did not intend to die intestate as to any part of his estate. We find that in the sixteenth item of his will he says: 'And to provide for any omissions, I name my daughter, Mildred, the residuary legatee,' but she is to have her full share, and not to account for anything she may receive under this residuary clause." The sixteenth clause is the one now under consideration. It appears from the above excerpt from the opinion of the Court in the case that our brethren of that day regarded clause sixteen as referring to both realty and personalty. They were considering whether a tract of land containing about 800 acres had been sufficiently described to pass to the defendant under the will, but the Court was unanimous in the opinion that Mr. Cameron did not die intestate as to any of his property, but that it all, realty and personalty, had passed either under specific devises and bequests, and if not, then under the residuary clause. But we do not agree to the suggestion in that opinion that the reference at the close of the quotation referred "to anything she received under the residuary clause," but solely to money or property given to her in the testator's lifetime, which, but for his explicit direction in the residuary clause, might be taken and charged against her as advancements.

Our conclusion is that upon the facts stated in the record this property passed to Mildred Cameron by her father's will, and, by her will, it passed to the defendant, and that the latter is now the owner thereof, and can convey a good and indefeasible title thereto to the plaintiff by the deed which the court has required him to execute.

There is no error, and we affirm the judgment.

Affirmed.

MAGGIE E. BURCH, ADMINISTRATOR, v. J. D. BUSH & COMPANY.

(Filed 23 March, 1921.)

1. **Contracts—Death of Party—Survival of Action—Executors and Administrators.**

Ordinarily a contract made by a person who has since died without performing his obligations thereunder is binding upon his executors and administrators, with exception only when from the nature of the contract it required his personal performance, or from its terms it is ascertained that such was the intention of the parties.

2. **Same—Timber—Lumber.**

A contract to cut standing timber and manufacture it into lumber, according to specifications set out in the written agreement, is not alone such an one as to require the personal performance of the party obligated, and an action thereon survives against his executors and administrators, who must either have it performed or remain liable in damages for its breach.

3. **Same—Breach—Performance Prevented—Quantum Meruit.**

Where the death of a party to a contract does not relieve his estate from liability thereunder, and the other party abandons his contract or will not permit the personal representatives to proceed, it will relieve the personal representatives from this obligation, and permit them to recover as upon a quantum meruit, for the work done or services rendered under the contract by their intestate in his lifetime.

4. **Contracts—Breach—Death of Party—Payments—Mistake—Damages—Counterclaim.**

Where, under a contract to cut and manufacture lumber, there is a provision for the owner to make partial payments as the work progresses, which has been terminated by the death of the other party, it is competent for the surviving party to show that he has made the partial payments in excess of those required by his contract through his mistake or misapprehension, as a counterclaim in an action thereon by the personal representatives of the deceased party. *Simms v. Vick*, 151 N. C., 78; *Worth v. Stewart*, 122 N. C., 258, cited and approved.

APPEAL by defendant from *Kerr, J.*, at August Term, 1920, of FRANKLIN.

Civil action, brought to recover moneys alleged to have been withheld on a logging and sawmilling contract.

On 16 December, 1915, plaintiff's intestate entered into a written contract with the defendant whereby he undertook to cut a certain tract of standing timber and manufacture the same into lumber as per specifications set out in the written agreement—the work to be completed within eighteen months. It was stipulated in the contract that the cutting and sawing of said timber was to be paid for as the work progressed, settlements to be made every two weeks; and the defendant was given the right to reserve and hold back 10 per cent of the amount due on the lumber delivered as a guarantee for the satisfactory fulfillment of the contract.

In August, 1916, plaintiff's intestate was accidentally killed at his sawmill while engaged in carrying out his contract with the defendant. Plaintiff alleges that at the time of the death of the intestate, the defendant had in its hands the sum of $445.22 as moneys reserved on lumber manufactured and delivered up to that date. The defendant answered and alleged that upon a proper accounting between the parties, up to the date of the death of plaintiff's intestate, it would appear that the defendant had made overpayments to the amount of $282.19, and asked for an affirmative judgment against plaintiff for this sum. Later the defendant filed an amended answer, and set up by way of further defense and counterclaim that the defendant had suffered damages in the sum of $1,126.77 as the difference between the contract price and what it cost the defendant over and above that price to have the remainder of the timber cut and manufactured into lumber.

His Honor, being of opinion that the contract was personal to plaintiff's intestate, and that his death relieved his representatives from further fulfillment, and also being of opinion that the fortnightly settlements were binding between the parties, excluded evidence which the defendant proposed to offer on its counterclaims and directed a verdict in favor of the plaintiff. Defendant excepted and appealed.

William H. and Thomas W. Ruffin for plaintiff.
Willis Smith for defendant.

STACY, J. We think his Honor erred in holding, as a matter of law, that the contract in question was personal, and that further performance was not required after the death of plaintiff's intestate.

The general rule is that contracts bind the executor or administrator, though not named therein, and that death does not absolve a man from his engagements. There is an exception, however, to this general rule, equally well established, that in contracts requiring the continued existence of a given person or thing, a condition is implied that the impossibility of fulfillment, arising out of the death of the person or destruction of the thing, shall excuse the performance. *Stagg v. Land Co.,* 171 N. C., 583; *Yerrington v. Green,* 7 R. I., 589; *Mendenhall v. Davis,* 21 L. R. A. (N. S.), 914, and note.

The line of demarcation between a personal contract, which is terminated by death, and one which the personal representatives of the deceased are required to fulfill is not very clearly defined. The reasons for this become obvious and apparent upon a moment's reflection. Two elements which enter into the making of a contract, namely, the intention and understanding of the parties, are not subject to any fixed standard of "weights and measures." They are invisible and intangible things, variable with time and place, and undeterminable by any constant or set formula. Hence, no hard and fast rule can be established for their ascertainment. To be sure, in the broad outlines, certain contracts are not difficult of classification. Those of a strictly personal nature, involving particular personal skill or taste, such as a contract of an author to write a book, an artist to paint a picture, a sculptor to carve a piece of statuary, a singer to give a concert, and a promise to marry, are personal contracts and die with the person. Death makes the performance of such contracts impossible; and, indeed, removes the main object and inducement for the agreement. Executors and administrators are unable to perform such contracts, and the estate of the deceased cannot be held liable in damages by reason of the failure to complete them. Ordinarily, contracts not falling under this exception come under the general rule, and death does not excuse performance. 13 C. J., 643, *et seq.*

"The true question is whether the contract, properly construed, requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question, and is to be answered in the same way, as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance." *Drummond v. Crane,* 159 Mass., 577.

On the other hand, the parties, by express terms, may exclude substituted performance. But there is a twilight zone in which, by reason of the ambiguity of some contracts, the intention of the parties must become the determining factor. The facts and circumstances of each particular case should be taken into consideration in determining whether the contract is purely personal in its nature, and therefore terminated by death, or one which the personal representatives can complete as well as the deceased could have done had he lived. As said in *Siler v. Gray*, 86 N. C., 566: "The general rule unquestionably is that the personal representatives of a party are bound to perform all of his contracts, whether specifically named in them or not, or else make compensation for their nonperformance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself *in person*."

Assuming such to be the law, whether a given case falls under the general rule or the exception must depend upon the intention of the parties; for, at last, it is in every case purely a question of their understanding and agreement. *Steamboat Co. v. Transportation Co.*, 166 N. C., 582; *R. R. v. R. R.*, 147 N. C., 368.

Viewing the contract between the parties here presented in light of the foregoing principles, we see nothing which would take it out of the general rule. Its terms are clear and unambiguous. It may be performed by the administrator, or he may secure others to do it, as well as the deceased could have done had he not been killed. The parties have agreed unconditionally, and this is the law of contracts voluntarily assumed. *Clancy v. Overman*, 18 N. C., 402.

Of course, where the personal representatives of a deceased are able to do so, and, in good faith, offer to complete the contract, and the other party refuses to accept such offer and declines to permit the personal representatives to proceed, such would relieve them from further performance. They would be entitled, then, to an accounting, and to recover as upon a *quantum meruit*. *Whitlock v. Lumber Co.*, 145 N. C., 120; *Navigation Co. v. Wilcox*, 52 N. C., 481, and *Buffkin v. Baird*, 73 N. C., 283. Again, the surviving party may abandon the contract and thus forfeit his right to call upon the personal representatives of the other party to continue with the agreement. In such case he could not hold the estate liable for damages occasioned by his own effort to fulfill the contract. *Harwood v. Shoe*, 141 N. C., 161; *Harris v. Wright*, 118 N. C., 422.

The record discloses no evidence, as offered by the defendant, tending to support its first counterclaim relating to alleged overpayments. In the absence of any evidence to support an allegation, the court would be justified in giving a peremptory instruction. But such evidence, if any, we think, would be competent to show payments made under a misapprehension, or mistake of fact, following the doctrine announced in *Simms v. Vick*, 151 N. C., 78, and *Worth v. Stewart*, 122 N. C., 258.

With the case going back for a new trial, we refrain from further comment, as we do not care to prejudice the rights of the parties prior to a development of all the evidence.

New trial.

J. W. WATTS v. LENOIR AND BLOWING ROCK TURNPIKE COMPANY.

(Filed 23 March, 1921.)

1. Constitutional Law—Statutes—Private Acts—Corporations—Amendments—Turnpikes—Roads and Highways—Counties—Leases.

A turnpike company having powers under its charter, and also under a special act of the Legislature, acquired from the county commissioners a lease for fifty years to a certain length of a public road, to be used as a part of its turnpike road, with the right to place one or more toll gates thereon, before the recent adoption of the amendments to our State Constitution, and improved the same by the expenditure of large sums of money: *Held*, an act of the Legislature, passed since the adoption of the constitutional amendment, that prohibited the turnpike corporation from continuing the existence of a toll gate at or near a certain terminus of its road, necessary to the full enjoyment of the returns therefrom, and permitting a part thereof to be used toll free, is invalid under Art. VIII, sec. 1, of the Constitution as amended, which requires that the General Assembly shall provide by general laws for amending, etc., charters of all corporations, expressly stating turnpike companies, and excluding them from the exceptions to the general law.

2. Same—Vested Rights.

The recent amendment to our Constitution, by substituting a new section for Art. VIII, sec. 1, prohibiting the Legislature, with certain exceptions, from creating or amending the charters of corporations, by special act, but requiring this to be done under a general law, renders invalid a later special act of the Legislature, attempting to amend the charter of a turnpike corporation, affecting rights theretofore acquired, and also acquired under special statutes, enacted before the adoption of the constitutional amendments.

3. Same—Tolls.

Where a turnpike corporation has acquired certain rights under statute authorizing a lease of a public road from a county, and has expended thereunder for improvements thereon large sums of money, a subsequent amendatory act which, by restricting the placing of a toll gate at a certain place, deprives the company of its right to collect a substantial part of its revenue from the road, impairs and destroys a vested property right, and is unconstitutional and invalid.

4. **Same—Eminent Domain.**

A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public, or other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid.

5. **Same—Regulation of Tolls.**

Where a turnpike company has dedicated its property to a public use, the principles applying to *quasi*-public corporations in relation to the regulation of rates of tolls through properly constituted agencies generally apply.

CIVIL ACTION, heard by agreement of parties, before *Harding, J.*, at Marion N. C., September, 1920.

The action is instituted by plaintiff, a taxpayer, citizen, and resident of Caldwell County, living on the line of the defendant's road within the prescribed limits, and necessarily paying toll for travel thereon, in behalf of himself and all others in like case, and also a stockholder of defendant company, to compel defendant, an incorporated turnpike company, from maintaining toll gates, and enforcing the collection of toll on that portion of the road from Lenoir, N. C., eight miles out towards and beyond the town of Patterson, N. C.

On the pleadings, affidavits, and evidence offered the court finds the facts and entered judgment denying relief in terms as follows:

"This cause coming on to be heard before me at chambers in Marion, North Carolina, by agreement of the parties plaintiff and defendant, and being heard upon the pleadings, exhibits, and affidavits offered as evidence in the case, and admissions made by counsel at the argument, the court finds the following facts:

"1. That in the year 1903 the General Assembly of North Carolina passed an act authorizing the board of county commissioners of Caldwell County to lease, or otherwise contract and dispose of, to any turnpike company or person, a stretch of road six and one-half to seven miles in length, and leading from Lenoir to the ford of the Yadkin River at the old Baptist and Advent churches, reference to said act is hereby had, see chapter 473 of Public Laws of 1903.

"2. That on 6 September, 1901, the board of county commissioners of Caldwell County, under and by virtue of authority contained in the act referred to, leased to the Lenoir and Blowing Rock Turnpike Company, a corporation which had been chartered and organized under the laws of North Carolina, the said stretch of road mentioned in finding of fact No. 1, for the term of fifty years, a certified copy of lease so made to said turnpike company is on file in the papers in this case, and reference to the same is hereby had as a part of this finding of fact.

‘3. That under said lease said turnpike company immediately took ssession of said road, which was then in bad condition, and at once gan to improve and repair it, such repairs consisting in laying down macadam on and along the said road, cutting down the grade, and, ere it became necessary by changing the location of the road for a nsiderable distance, that is to say: built on a new and better grade from foot of Warrier's Gap on the south side of the foot of said gap to north side, a new road for some distance entailing the expenditure a large sum of money extending over a period from the date of the se up to the present time, which would not be less than from $40,000 $50,000, so expended.

‘4. That after said Lenoir and Blowing Rock Turnpike Company k over the said stretch of road, it maintained a toll gate over the ne, and has continued to do so up to the present time, collecting such ls as it was authorized to collect from subjects of toll passing over d road.

‘5. That during the year 1911 the General Assembly of North Caro- a amended the act of 1903, before referred to, by permitting the said npany to maintain one or more toll gates, and the right to declare idends, repealing that portion of the act restricting the location of a gate and fixing the tolls over said road.

‘6. That on 28 January, 1911, the General Assembly of North Caro- a passed an act ratifying, confirming, and approving the charter of Lenoir and Blowing Rock Turnpike Company, and all proceedings acts thereunder, and in pursuance thereof made all such acts valid. erence is hereby made to said act, chapter 62, Public-Local Laws 1.

7. That the General Assembly of North Carolina, at its special ion in August, 1920, passed the following act:

‘H. B. 466, S. B. 362, An act to amend chapter 62, Public-Local vs, session one thousand nine hundred and eleven. The General embly of North Carolina do enact:

‘SECTION 1. That chapter 62, Public-Local Laws of North Carolina, ion one thousand nine hundred and eleven, be amended by adding at end of section three of said chapter the following: “The said com- y shall not be allowed to maintain any toll gates thereon nearer than it miles from the corporate limits of the town of Lenoir, nor shall it ease its tolls over those charged at present.”

‘SEC. 2. That this act shall be in force from and after its ratifi- on.

‘In the General Assembly read three times, and ratified this 26 ust, 1920.’

"8. That the charter of the Lenoir and Blowing Rock Turnpike Company provides, among other things, that the company has the right to maintain two or more toll gates, at desirable points, between Lenoir and Blowing Rock, N. C., and by the amendment before referred to. said act of 1903, one or more toll gates is allowed to be maintained by said company over the stretch of road from Lenoir to the ford of the Yadkin River at the Baptist and Advent churches.

"9. That the amount of tolls which are taken in from subjects of toll passing over this stretch of road from Lenoir to the ford of the Yadkin River at the Baptist and Advent churches amounts annually to a large sum, which, together with toll defendant would be unable to collect on through travel from Lenoir to Blowing Rock, and from Blowing Rock to Lenoir, if its toll gate be moved as required by the act of August, 1920, would entail a loss upon the defendant in tolls of approximately $4,000 to $5,000 per annum.

"10. And that to maintain and keep in good state of repair said stretch of road it will take several thousand dollars a year.

"11. That the effect of the act of August, 1920, if any, upon the Lenoir and Blowing Rock Turnpike Company would be to repeal by implication the right of said company to maintain a toll gate between Lenoir and the ford of the Yadkin River at the Baptist and Advent churches, and remove said toll gate about one mile up the mountain from Patterson, N. C., and that if said company is denied the right to maintain said toll gates as at present located, and to collect tolls from subjects passing over and upon said road, that it will entail a loss of several thousand dollars to said company, and said company would not have any revenue from this portion of the road with which to keep up and maintain the same, where travel on said portion originated thereon, and went in the direction of Lenoir, N. C., or where the travel originated for points east and concluded before reaching the first gate.

"12. That owing to the expenditure of a large sum of money on the part of the Lenoir and Blowing Rock Turnpike Company upon said road, including the purchase of land for a new roadbed at Warrier's Gap, making grades and otherwise improving said road represents a large vested interest of said company.

"13. That if said toll gate now maintained along the line of said road is required to be taken down, and the company denied the right to collect tolls, that the effect of this will be to leave the company without any means derived from this portion of the road with which to keep it up, as set out in paragraph 11 above, but would still leave the company in a position of responsibility to keep up and maintain the same, and be responsible for any liabilities resulting from a failure of the performance of this public duty.

"14. That if said toll gate is removed it will at once open up the road to a portion of the inhabitants of Caldwell County and others to use free this stretch of road, while other persons and subjects of toll living north of the toll gate between Patterson and Blowing Rock would be required to pay toll.

"Upon the foregoing finding of facts, the court is of the opinion that the act of the Legislature passed by the General Assembly of North Carolina, special session 1920, before herein referred to, is unconstitutional and void:

"It is therefore considered and adjudged that the relief sought by the plaintiff be and the same is hereby denied. It is further adjudged that the plaintiff pay the costs of this action, to be taxed by the clerk. By consent, this order was signed out of the district on 27 October, 1920.

WM. F. HARDING,
Judge Presiding."

Plaintiff excepted and appealed.

Mark Squires and W. C. Newland for plaintiff.
Council & Yount, Lawrence Wakefield, and H. P. Grier for defendant.

HOKE, J., after stating the case: It appears from the legislation and findings of fact pertinent to the inquiry and fully embodied in the judgment that defendant is a corporation having the right under the statutes applicable to construct and maintain a turnpike road from Lenoir, N. C., to Blowing Rock and beyond; to operate stage lines thereon; to charge and collect tolls of travelers using the same; and are allowed to establish two or more toll gates along the route at points considered desirable for the convenient and efficient collection of tolls. That a part of this route from Lenoir for six miles or more to the ford of the Yadkin River, near Patterson, N. C., the road is held by a lease of fifty years duration from 6 September, 1909, said lease being made by the county commissioners under legislative authority expressly conferred by statute, and that soon after taking said lease defendant company, at great cost, changed the grade and otherwise improved said road and the tolls of persons living along this portion of the road when traveling to Lenoir and otherwise amounts to several thousand dollars per year. That one of the toll gates established under the laws applicable and necessary to the efficient collection of tolls is on this portion of the route and about four miles from Lenoir. That at the special session of 1920 the General Assembly passed a special act purporting to amend chapter 62, Public-Local Laws of 1911, the same containing in effect the chartered rights of the company, and which provided that the statute referred to be amended by adding to the end of section 3 the following: "The said company shall not be allowed to maintain any toll gates thereon nearer than eight miles from the corporate limits of Lenoir, N. C., nor shall it increase its tolls over those charged at present?" It further appears that the force and effect of this statute, if the same is allowed to prevail, will be not only to deprive the company of its right to maintain its toll gates as the act of incorporation provided, but in its practical and necessary operation will disenable it from collecting any tolls of persons using only that portion of the road for eight miles out from Lenoir, and this being true, we are of opinion that the act is void as contrary to certain recent amendments to our Constitution, which inhibit any special legislation in amendment of charters of this kind, and that in any event such an amendment would be declared invalid as impairing and destroying vested property rights of the company contrary to the law of the land.

In reference to the first proposition, it will be recalled that with the view of relieving the Legislature of the time and work not infrequently expended on local measures which could as well be accomplished under general laws, and allowing time for fuller deliberation on matters of public moment, the General Assembly of 1915 submitted several amendments to the Constitution, which were ratified by vote of the people in 1916, and became effective as part of the organic law 10 January, 1917. *Kornegay v. Goldsboro,* 180 N. C., 441; *Mills v. Comrs.,* 175 N. C., 215; *Reade v. Durham,* 173 N. C., 668.

In a large number of these designated subjects, appearing principally in Art. II, sec. 29, of the Constitution, among them measures which authorize the laying out, opening, altering, maintaining or discontinuing highways, etc., the General Assembly is expressly prohibited from passing any "local, private, or special act or resolution," except to repeal same, and the section provides further that "any local, private, or special act or resolution passed in violation of this section shall be void."

In pursuance of the same purpose and policy, and by amendment submitted, ratified, and becoming effective at the same time, sec. 1 of Art. VIII of the Constitution was stricken out and a new section substituted. This Art. VIII is entitled "Corporations other than municipal," and the original and substituted sections are as follows:

Section 1, as it originally appeared: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the Legislature the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

And the substituted section is as follows: "Section 1. Corporations under general laws. No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations, and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation."

From a perusal and comparison of the two sections, and a proper consideration of authoritative cases in which same have been interpreted and applied, it is clear, in our opinion, that, except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of Government, and except, also, in the instances expressly designated in the section of "Corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State," this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all *quasi*-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interests, as in *Southern Assembly v. Palmer,* 166 N. C., 75; *Comrs. v. Webb,* 160 N. C., 594, etc.

For reasons stated in the fully considered case of *Kornegay v. Goldsboro,* 180 N. C., 440, the inhibitory features and effect of these amendments do not apply or extend to municipal or *quasi*-public corporations, such as counties, cities, towns, and other recognized governmental agencies, other than changing the names of cities and towns, and creating or changing lines of townships and schools and districts. Apart from these, however, and as to corporations above stated, special legislation is now prohibited, and the act of 1920, upon which the plaintiff rests his claim for relief, coming directly within the constitutional provision, has been properly held invalid. *Kornegay v. Goldsboro, supra; Mills v. Comrs.,* 175 N. C., 215; *Board of Education v. Board of Comrs.,* 174 N. C., 47. And though the attempted amendment in question here had been passed in accord with constitutional methods, that is, under the provisions of a general law, it could not be upheld for the reason that it destroys or impairs vested rights of property. True, that in order to relieve the State and its Legislature from the restrictions imposed by the principles of the *Dartmouth College case,* and which were such as to threaten, and in their subsequent application at times interfere with, the efficient administration of well ordered government, this Art. VIII, in sec. 1, reserves to the General Assembly the power to amend or repeal all corporate charters, and while the right of repeal is at all times absolutely with the Legislature, the power of amendment as contained in this reservation is by no means unlimited. In order to its proper exercise, the proposition must be germane or in some way promotive of the principal corporate purpose as contemplated by the charter or in reasonable regulation of its methods, and the decided cases are agreed in the position that an amendment which destroys or sensibly impairs the vested property rights of the company, or which attempts to transfer them either to the public or other except under the principles of eminent domain and upon compensation duly made, must be held invalid. The principle, as stated, was fully recognized by this Court in *R. R. v. Comrs.*, 108 N. C., 56, and is in general accord with the authorities on the subject. *Shields v. Ohio*, 95 U. S., 319; *Comrs. v. Power Co.*, 104 Mass., 446; *Commonwealth v. Essex Co.*, 79 Mass., 239; *City of Detroit v. Howard Turnpike Road Co.*, 43 Mich., 140; Clark on Corporations, p. 212; 26 R. C. L., p. 1399; Turnpike and Toll Roads, sec. 5; 10 Cyc., p. 1087.

In *R. R. v. Comrs., supra*, it was attempted, under guise of an amendment and by a proposed popular vote, to divert a municipal subscription made to a designated railroad route, after said subscription had been contracted to another and in part earned, and in disapproving the measure the Court held: "The provision in the Constitution (Art. VIII, sec. 1) which reserves to the General Assembly the power to alter or repeal acts incorporating companies does not authorize the enactment of a statute which, under the pretense of protecting a public interest, or exercising an acknowledged police power, appropriates the corporate property to the public use."

In *Commonwealth v. Essex*, *Chief Justice Shaw* states the principle as follows: "The rule to be extracted is this: 'That where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property rights which have become vested under a legitimate exercise of the powers granted.'"

And, speaking generally to the position in *Shields v. Ohio, supra*, *Associate Justice Swayne* said: "The power of alteration is not without limit, the alterations must be reasonable, they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases."

Doubtless, as in other cases of *quasi*-public corporations who have dedicated their property to public use, the rates of toll through properly constituted agencies may be and are subject to reasonable regulation. It was so held in the last case cited of *Shields v. Ohio,* and the principle is fully established with us. But such a principle gives no sanction to the case presented here. Where the proposed act in its practical operation takes from defendant company, and without compensation, eight miles of its road, in which they have a chartered right to collect tolls, and which they hold by a lease for fifty years under legislative authority, and on which they have done a large amount of costly work.

In any event, therefore, such an act is in clear conflict with the constitutional guarantees protecting vested rights of property, and the judgment of his Honor declaring same invalid must be

Affirmed.

J. H. PUSEY, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 March, 1921.)

1. **Automobiles—Passengers—Imputed Negligence—Evidence—Instructions.**

   The principle applying that when two or more people riding in an automobile, on a joint enterprise, either for pleasure or on business, the one not driving is responsible for the contributory negligence, the proximate cause of the injury for which damages are sought in the action, must have supporting evidence in order to correctly give a requested instruction thereon.

2. **Same—Contributory Negligence.**

   Where the contributory negligence of one driving an automobile is sought to be attributable to another occupant in the car, who received an injury proximately caused by such negligence, the mere fact that they were taking a pleasure ride at the time does not alone create a joint enterprise, and the negligence of the driver of the car will not be imputed to the injured occupant unless such occupant was the owner of the car, or had some kind of control over the driver; the relation of host and guest alone being insufficient.

3. **Same—Knowledge of Passenger.**

   A prayer for instruction which places upon a guest in an automobile the duty to remonstrate with the driver thereof in order not to have the latter's contributory negligence imputed to him in his action to recover damages caused by a collision with a train, is erroneous where there is lack of evidence that the plaintiff was aware of or should have known of the circumstances tending to show the negligence of the driver of the automobile.

4. Railroads—Automobiles—Public Crossings—Safety of Crossings.

The principle announced in *Tate v. R. R.*, 168 N. C., 523, and *Raper v. R. R.*, 126 N. C., 563, as to the negligence of a railroad company in failing to maintain its track at a public crossing as safe and convenient to the public as it would have been if the railroad had not built across such crossing, approved.

5. Railroads—Automobiles—Negligence—Joint Liability.

An instruction to the jury, under the evidence in this case, making a railroad company and the driver of an automobile liable in damages for an injury proximately caused to a guest in the automobile, by their concurrent negligence, is approved on the principle announced in *Bagwell v. R. R.*, 167 N. C., 616.

APPEAL by defendant from *Connor, J.*, at the September Term, 1920, of SAMPSON.

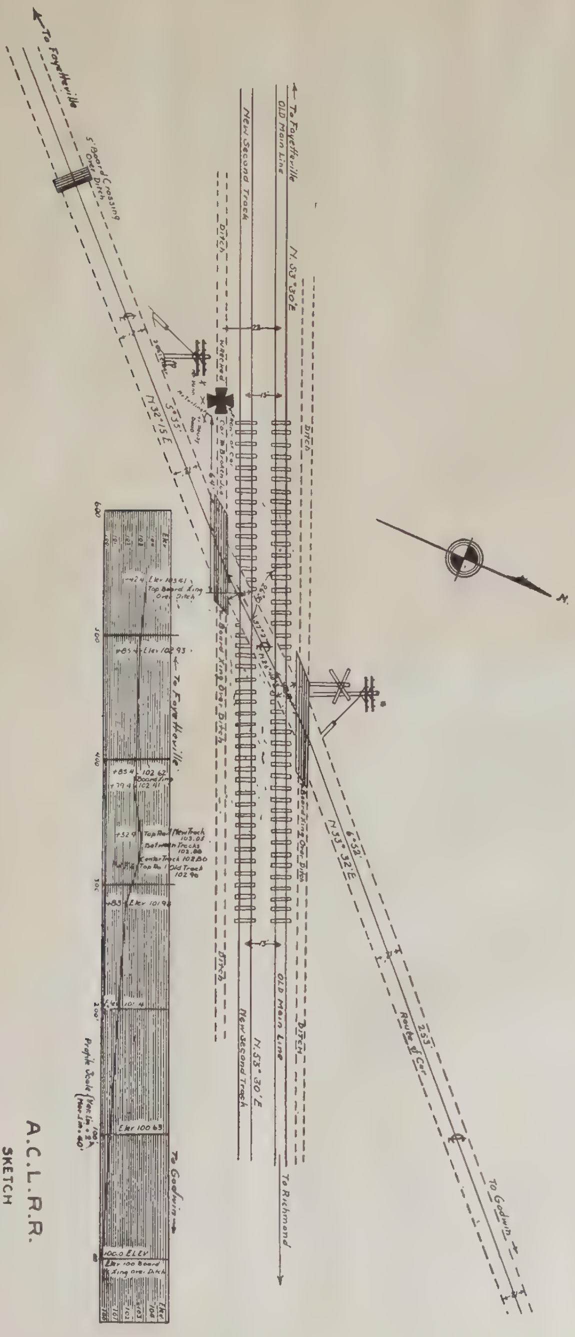
This is a civil action to recover damages for wrongful death alleged to have been caused by the negligence of the defendant.

Randall Pusey, plaintiff's intestate, together with Henry Vann and Festus Turlington, were going from Falcon to Fayetteville, riding in a Ford runabout, Vann being the owner and driver of the car. The public road upon which the plaintiff's intestate was traveling crosses the Atlantic Coast Line Railroad just above Wade Station in Cumberland County at an acute angle. At the time of the injury complained of, 29 August, 1914, the defendant company was constructing a new track, parallel to its original track, and about eight feet distant therefrom, the new track having been practically completed at the crossing referred to, except that the dirt had not been packed in guard-planks laid down over the crossties as is always done when such crossings are completed.

The young men approached this crossing from the west side, passed over the old track, but when the wheels struck the rails of the new track they skidded, and the car was thrown something like 15 feet across the track to the point indicated on the plat, the front end of the car was reversed, and the three occupants thrown out, young Pusey being instantly killed.

The evidence was conflicting as to the rate of speed of the automobile at the time of the injury. Henry Vann, the driver of the car, testified that when he got on the track he was running from six to ten miles per hour. He also admitted that he had been drinking cider, and other witnesses testified to the same effect.

The evidence showed that many automobiles had passed over the crossing on the day in question; that there was a camp meeting going on at Falcon, and that the cars going to and coming from Fayetteville had to pass over this crossing.



A.C.L.R.R.

SKETCH

SHOWING ROAD CROSSING. 58¼ MILE POST.

There were three issues submitted to the jury: first as to the negligence of the defendant; second, as to the contributory negligence of the plaintiff's intestate; and third, as to damages.

The jury answered the first issue "Yes," the second issue "No," and the third issue "$10,000."

The only exceptions in the record are based upon the charge of the judge to the jury, and his refusal to give certain instructions as prayed for by the defendant, as follows:

"1. The defendant contends that a passenger in an automobile, which is being driven by another at a dangerous rate of speed, may be charged with negligence if he remains in the car and does not remonstrate with the driver, and that if the jury should have found from the greater weight of the evidence in this case that Henry Vann was driving the car at a dangerous rate of speed, and that Pusey remained in the car and made no effort to stop him, and that such conduct on the part of Vann, acquiesced in by Pusey, contributed to the injury complained of, then the jury should have answered the second issue 'Yes,' and his Honor erred in refusing to so charge.

"2. That his Honor should have given the second prayer for instructions, to wit: If the jury shall find from the greater weight of the testimony that young Pusey was going to Fayetteville with Turlington and Vann on a pleasure trip, and that they were all engaged in a joint enterprise, either of business or pleasure, and if the jury shall further find by the greater weight of the evidence that Pusey trusted the management of the car to Vann, and that Vann drove the car at a dangerous rate of speed, or entered a dangerous zone or crossing at a rate of speed in excess of what would be prudent under the circumstances; and if the jury shall further find that the injury would not have occurred but for said conduct on the part of Vann, then I charge you that Pusey would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.'

"3. That it was error to refuse to charge as requested as follows: I charge you that it is negligence on the part of a passenger if he commits his safety to an intoxicated driver of an automobile; and if the jury shall find from the greater weight of the evidence that Henry Vann was intoxicated, or under the influence of intoxicating liquors, and that this fact was known to young Pusey, and that Pusey continued his journey to Fayetteville under such circumstances; and if the jury shall find from the greater weight of the evidence that the injury complained of was caused by the intoxicated condition of Vann, or if said intoxicated condition contributed to said injury, then the deceased was guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.'

"4. That it was error to refuse to charge the jury that if they should find from the greater weight of the evidence that Henry Vann, the driver of the car, entered upon the crossing of the defendant at a greater rate of speed than six miles per hour, in violation of chapter 191 of the Public Laws of 1909, then Vann would be guilty of a violation of the criminal law; and if the jury should further find that Randall Pusey, at the time of the accident, was engaged with Vann in a joint enterprise, that is to say, that they were going to Fayetteville for recreation, and that Pusey did not remonstrate with Vann, or undertake to control the speed of the car, that Pusey would also be guilty of a misdemeanor in that he aided and abetted Vann in the violation of the criminal statute; and if the jury shall further find that but for such act and conduct on the part of Pusey the injury would not have occurred, then it would be the duty of the jury to answer the second issue 'Yes.' His Honor refused to give said instruction, and defendant excepted.

"5. That it was error to charge the jury as follows: The court charges you that from the evidence in this case, and the defendant so admits, that the crossing in question was across a public highway extending from Dunn to Fayetteville, and unless the defendant company built and maintained its tracks at said crossing, in a manner as safe and convenient to the public as it would have been if said railroad had not been built across said highway, then such neglect of duty would constitute negligence, and defendant excepted.

"6. That it was error to charge the jury that if they found that the negligence of the railroad company was the proximate cause of the injury, then they should answer the first issue 'Yes,' notwithstanding the fact that there was also negligence on the part of the driver; and he also charged them that if they found that the negligence of both the driver and the railroad company, both acting together, both concurring, both contributing to the result, caused the death of Mr. Pusey, then both the driver and the railroad company would be liable, and it mattered not which one the plaintiff sued; that he was entitled to recover of either, and in that event they would answer the first issue 'Yes,' and defendant excepted."

Fowler & Crumpler, Manning, Kitchin & Gavin, Butler & Herring, and Kerr & Herring for plaintiff.

Grady & Graham for defendant.

Allen, J. The charge states clearly the contentions of the parties, and covers the first and third exceptions by specific instructions.

The courts recognize the doctrine included in the second prayer for instruction, but, as is said in *Withey v. Fowler*, 164 Iowa, 377: "It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for present purposes to say that to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host or guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be derived does not materially alter the situation."

The rule seems to be: "That the occupant of the automobile must be in a position to assume the control or control in some manner the means of locomotion. *Lawrence v. Sioux City* (Ia.), 154 N. W., 494, and it has been held that the fact the driver and the occupant were mutually engaged in a pleasure ride did not create a joint enterprise. *Withey v. Fowler Co.,* 164 Ia., 377; *Beard v. Klusmeier,* 158 Ky., 153; Ann. Cas., 1915 D, 342."

In *Hunt v. R. R.,* 170 N. C., 442, this principle was adopted, the Court saying: "Furthermore, it is held by the greater weight of authority that negligence on the part of the driver of an automobile will not as a rule be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See a learned opinion on the subject by *Associate Justice Douglas* in *Duval v. R. R.*, 134 N. C., 331, citing *Crampton v. Ivie,* 126 N. C., 894, both of these decisions being approved in the more recent case of *Baker v. R. R.*, 144 N. C., 37. See, also, *Bagwell v. R. R.*, 167 N. C., 611; *McMillan v. R. R.,* 172 N. C., 853."

In this case there is no evidence that Pusey had any control over the car, and therefore none that he was engaged in a joint enterprise with Vann, and, on the contrary, all the evidence is that Vann was the owner and driver of the car; that Pusey was a guest riding for the pleasure of the trip, and had no control over the car and nothing to do with driving it.

The prayer, therefore, had no evidence to support it, and could not have been given.

The fourth prayer for instruction is objectionable in several respects. It required the submission to the jury of the question of Vann and Pusey being engaged in a joint enterprise when there was no evidence to support it, and it contains the direction to the jury that going to Fayetteville for recreation is a joint enterprise, which, as we have seen, is not in accord with the authorities.

It also imposed the duty on Pusey to remonstrate, although he might not have known that Vann was exceeding the speed limit.

The fifth exception is to a part of the charge which is substantially copied from *Raper v. R. R.*, 126 N. C., 563, approved in *Tate v. R. R.,* 168 N. C., 523, and the sixth to a charge which is fully sustained by *Bagwell v. R. R.,* 167 N. C., 616.

After careful consideration of the record and briefs, we conclude that the judgment ought to be affirmed.

No error.

STACY, J., took no part in the decision of this case.

S. R. BOONE ET AL. v. EUGENE SYKES ET AL.

(Filed 30 March, 1921.)

1. Deeds and Conveyances—Fraud—Mental Incapacity—Evidence.

In a suit to set aside a deed for mental incapacity of the grantor, it was competent to show that she had a fall resulting in a fractured hip a year before the making of the deed, when she was of weak mind, more than eighty years of age, with the further evidence that thereafter her mental and physical condition grew worse until her death.

2. Appeal and Error—Assignments of Error.

An assignment of error should comply with the rule of court in setting out therein the evidence to which objection is made.

3. Deeds and Conveyances—Fraud—Mental Incapacity—Evidence—Hypothetical Questions.

Where the sufficiency of a deed for the want of mental capacity of the grantor to make it is in question, and the plaintiff is permitted on cross-examination to testify to the sanity of the grantor, assuming certain facts to be true, it is competent for him to testify as to his opinion if the facts were reversed, and not reversible error for the lack of supporting evidence, such being necessary to give the jury a proper estimate of the testimony of the witness.

4. Deeds and Conveyances—Fraud—Mental Incapacity—Evidence.

Where there was evidence tending to show that the grantor in a deed, sought to be set aside for mental incapacity, was eighty years of age and of feeble mind at the time, and gradually grew worse until her death, testimony that six or eight months after executing the deed she sent for witness, stating she had no recollection thereof, but upon his recalling it to her mind recollected and was satisfied with it, is not prejudicial to the defendant; but, if otherwise, it was competent upon the question of the grantor's mental capacity at the time she executed the conveyance.

5. Deeds and Conveyances—Mental Incapacity—Consideration—Evidence—Value of Crops.

Upon the question of the inadequacy of the consideration of a deed sought to be set aside for lack of the mental capacity of the grantor, where a witness has testified that at the time of its execution in 1917 the land was poor and sorry, with big gullies and washes on it, etc., and as to its consequent value, it is competent to show in contradiction that the following year the land yielded a good and valuable crop, without a change in the condition of the land.

APPEAL by defendants from *Kerr, J.,* at the August Term, 1920, of FRANKLIN.

This is an action to set aside a deed made by Mrs. Cornelia M. Boone to her daughter, Mrs. Eugene Sykes, upon the ground that the grantor did not have sufficient mental capacity to execute a deed.

The jury returned a verdict in favor of the plaintiffs, and the defendants excepted and appealed from the judgment rendered on the verdict, assigning the following errors:

"1. To the admission of the evidence in regard to a fall which happened in 1916, more than a year prior to the execution of the deed here in question, on the grounds that the admission of such evidence tended to confuse the issues in the minds of the jury, and led them to think that grantor's mind was affected by said fall.

"2. To the admission of an imaginary conclusion based upon an imaginary statement which had no evidence to sustain it. The witness previously admitted that he heard the other Mr. Edwards testify that Mrs. Boone told him Mr. Collie was riding up and down the road trying to sell the land; and there is no evidence that Mrs. Boone did not make this statement, or that Collie was not trying to sell said land.

"3. To the admission of evidence in regard to the mind of the deceased grantor based on a conversation between witness and deceased grantor eight months after the execution and delivery of the deed, on the grounds that the condition of the grantor's mind at this time had nothing to do with the condition of the same at the time of executing and delivering deed, and that the admission of such testimony tended strongly to influence the jury in sustaining the contention of the plaintiff that she was mentally incapable when she signed and delivered the deed.

"4. To the admission of the testimony relative to the value of the 1919 crop on the land in question, on the ground that such testimony is irrelevant in any aspect of the case, and especially for the reason that the value of the crops in no wise showed the value of the lands, because the crops depended upon fertilizer, improvements put on the lands by the defendant, their skill as farmers, and also upon the ever-varying law of supply and demand."

W. M. Person and W. H. Yarborough for plaintiffs.
William H. & Thomas W. Ruffin and Ben T. Holden for defendants.

ALLEN, J. The deed, which plaintiffs attack, bears date 31 December, 1917, and the first exception is to permitting a witness who had testified to an injury to the grantor, resulting in a fractured hip, to fix the time of the fall as early in 1916.

We see nothing in this prejudicial to the defendants, and it was competent in view of the evidence of the plaintiffs tending to prove that the grantor was more than eighty years of age, of weak mind, and that her mental and physical condition gradually grew worse from the time of the fall until her death.

The second assignment does not comply with the rule requiring the appellant to at least set forth in the assignment of error the evidence objected to, but upon examination of the record it appears that a witness for plaintiff was asked on cross-examination his opinion of the sanity of the grantor, assuming certain facts to be true, and plaintiff was permitted in reply to ask for his opinion if the facts were otherwise, which was necessary to give the jury a proper estimate of the testimony of the witness.

The evidence objected to and covered by the third assignment is as follows: "She sent for me six or eight months afterwards to come, and I went to see her, and she said 'I signed some papers before you they tell me and I do not recollect it, and I want to know what sort of papers they were.' I told her it was a deed for twenty-six acres of land, and it was to Mrs. Geneva Sykes, but she did not seem to know or recollect about it and said she was bothered about it. I explained it to her and tried to refresh her memory, and then she remembered it and seemed satisfied. This was some time in August."

This evidence was very favorable to the defendant, because, while she (the grantor) at first said she did not recollect signing the deed, when her memory was refreshed "she remembered it and seemed satisfied," thus confirming the deed eight months after its execution, but if hurtful to the defendant it was competent to be considered on the question of the mental capacity of the grantor at the time of the execution of the deed, as it was in evidence that the grantor was old and gradually growing weaker in mind and body.

The evidence of the value of the crops on the land in 1919 was brought out on the cross-examination of a witness for the defendant, who had testified, "Some of the land was worth $15 or $20 an acre, but it was poor, sorry land, big gullies and washes so that you could bury a horse anywhere you wanted to," and was properly admitted for the purpose of contradicting or testing this witness.

The witness testified, when asked the value of the crops in 1919: "I declare I do not know how much crop was raised on it, but a good crop, about six acres of tobacco, worth about a thousand dollars. The crops this year are about as good as they were last year."

If, as was thus shown, the crops raised on the land in 1918 and 1919 or 1919 and 1920 were good, the jury might well doubt the statement of the witness on his examination in chief that on 31 December, 1917, when the deed was executed, "it was poor, sorry land, big gullies and washes so that you could bury a horse anywhere you wanted to," evidence offered by the defendant to show that the consideration named in the deed was adequate.

We find no error in the trial.

No error.

W. A. LONG ET AL. V. COMMISSIONERS OF BRUNSWICK COUNTY.

(Filed 30 March, 1921.)

1. **Elections— Counties— County-seats — Electors — Qualified Voters — Votes.**

   An act submitting to the voters of a county the question of the change of location of the county-seat, and providing for a large debt for the county buildings to be erected in consequence, required that unless a majority of all "the qualified voters of the county" actually "voted" in favor of one of the designated places, a second election should be held for a choice between the two places receiving the highest and the next highest "votes": *Held*, the words "qualified vote or voters" are in accordance with the intent of the statute, equivalent to the words "qualified electors," and that a majority of the qualified voters at the election would be insufficient, unless also a majority of the qualified electors of the county, whether they voted or not.

2. **Same—Constitutional Law—"Faith and Credit"—Statutes.**

   An act permitting a county to change its county-seat, and to incur a debt for that purpose, submitting the question to the determination of a majority of the qualified voters thereof, must be approved under the provisions of our Constitution, Art. VII, sec. 7, requiring that for a county, etc., to contract a debt, pledge its faith, or loan its credit, it shall be ascertained by a majority of the qualified voters (in the sense of electors) therein, and not merely by a majority of those voting, if a less number.

3. **Constitutional Law—Statutes—Counties—"Faith and Credit"—Electors.**

   The words used in our Constitution requiring "a majority of the qualified voters of the county" to pledge its credit, except for necessary expenses, have a well known meaning in the law, and accordingly a mere majority of the votes cast at the election is insufficient if not also a majority of the qualified electors of the county, whether they voted or not.

4. **Statutes—Interpretation—Intent—Rhetoric—Verbal Inaccuracies.**

   Where the plain intent and meaning of a statute appear in its language, it will not be affected by rhetorical or verbal inaccuracy.

STACY, J., took no part in the decision of this case.

APPEAL by defendants from *Daniels, J.*, at chambers in BRUNSWICK, 13 September, 1920.

The General Assembly of North Carolina, at its regular session, 1919, passed an act entitled "An act to submit to the voters of Brunswick County the question of the location of the county-seat, and to provide county buildings," same being chapter 263 of the Public-Local and Private Laws of 1919. Under this act the board of elections of Brunswick County was authorized and directed to submit to the qualified voters of the said county the question of whether the county-seat should be located at Southport, Bolivia, or Supply. It was provided in said act that in the event no one of these places received a majority of the qualified votes of Brunswick County in said election, then under this statute a second election should be held for a choice to be made between the two places receiving the highest and the next highest votes.

In the first election Bolivia received 624 votes, Supply, 562, and Southport, 406; and it appears that 474 registered voters did not vote in said election. No one place receiving a majority of the qualified vote, a second election was ordered to be held between Bolivia and Supply. In this second election Bolivia received 754, Supply 370, votes, and it appears that 1,003 registered voters cast no ballot.

The returns of said election were duly canvassed and the result declared by the board of commissioners of Brunswick County on 5 July, 1920, said board declaring and designating Bolivia the county-seat of Brunswick County.

This action of the board of commissioners of Brunswick County in declaring and designating Bolivia as the county-seat is attacked by the plaintiffs on the ground that a majority of the qualified voters resident in Brunswick County did not cast their ballots in favor of Bolivia either in the first or second election. It appears from the allegations of the complaint that 754 qualified votes were cast in the second election for Bolivia, the same being a majority of the qualified votes polled, but less than a majority of the total number of registered voters in the county.

The whole case presents the question as to whether it was necessary for Bolivia, in the second election, to receive a majority of the qualified vote as cast, or the vote of a majority of the total number of registered voters in said county, in order to be declared the county-seat.

The court then held that before Bolivia could be declared the county-seat of Brunswick it must have received the favorable vote of a majority of the qualified voters resident in said county, whether all of them actually voted or not.

The action was brought to enjoin defendants from declaring Bolivia the county-seat of Brunswick County, or to take any action whatever for the purpose of effecting a removal of the county-seat from its present location at Southport. Upon the foregoing ruling, the court gave judgment for the plaintiffs, citizens and taxpayers of Brunswick County, enjoining the removal of the county-seat. Defendants appealed.

John D. Bellamy and Robert Ruark for plaintiffs.
McLean, Varser, McLean & Stacy for defendants.

WALKER, J., after stating the case: The only question necessary to be considered is whether a removal to Bolivia could take place, under the terms of the statute, unless a majority of all "the qualified voters of Brunswick County" had actually voted in favor of the same at the polls, or whether a majority of those who voted at the election was sufficient to authorize the removal, and the decision of this question turns on the meaning of the word "voters" as used in the statute. If the words "qualified vote or voters" is equivalent to "qualified electors," the judgment of the court below is correct, as Bolivia did not receive a majority of the qualified electors, or of the qualified votes of the county, when the word "vote" is taken in the sense of the registered vote, or list of registered electors.

There may be, and perhaps is, apparent conflict in the authorities elsewhere, but in this State, and by this Court, the meaning of the words a "majority of the qualified voters of a county" was finally settled long ago, and that meaning must now prevail with us. In *R. R. v. Comrs.*, 72 N. C., 486, the very question we have here was presented. There the plaintiff applied for a mandamus to compel the defendant to subscribe for six hundred shares of the plaintiff's stock for the county, and to issue county bonds in payment thereof. An election was held to ascertain the will of the people, and to get their approval thereof. Here the proposal is to remove the county-seat from Southport (formerly Smithville), and for that purpose that the county shall incur a very large debt to pay the costs and expenses of the removal and the erection of new buildings, that is $60,000 or more. In *R. R. v. Comrs., supra,* the object was to buy stock of the railroad company with bonds of the county, while in this case the purpose is to remove the county-seat, and thereby to incur a debt for which the defendants are authorized to issue the bonds of the county. It will be seen, therefore, that this case and that of *R. R. v. Comrs., supra,* are alike for all practical purposes, and are governed by the same principle. It was said in *R. R. v. Comrs., supra,* by *Justice Rodman:* "Our opinion as to the meaning of sec. 7 of Art. VII of the State Constitution relieves us from the necessity of considering any of the other questions which were ably and learnedly discussed by counsel. That section is in these words: 'Sec. 7. No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.' It is contended for the plaintiffs that these words mean a majority of the qualified voters therein who actually vote at the election upon the question. It is not the natural meaning of the words used, but requires an addition of words to qualify and limit the generality of the expression. If the words used are so ambiguous as to be unintelligible without some addition (as were the words prescribing the tenure of a judge appointed to fill a vacancy, commented on by the *Chief Justice* in the case of *Cloud v. Wilson, ante,* 155), such addition must be made as may be proper on a consideration of the context and of all other circumstances bearing on it. But to add limiting or qualifying words is not in general permissible, or, except for very strong reasons, when the words used contained an intelligible description of the object. The word 'therein' is important. It means 'in the county,' and the phrase may then be read as 'a majority of the qualified voters of the county.'" And likewise, in *Duke v. Brown,* 96 N. C., 127, *Chief Justice Smith* says that it was not intended to dispense with the approval of a majority of the qualified voters, and allow a minority, or inconsiderable fraction it might be to determine the result. Indifference, he says, is not the test, but an *"active and expressed approval* is necessary, and this is ascertained by a majority of those entitled to vote," and he further says that however numerous the contrary rulings in other States, we must adhere to our own construction of the words "qualified voters" as being necessary to protect our people. To the same effect are *Southerland v. Greensboro,* 96 N. C., 49; *McDowell v. Construction Co.,* 96 N. C., 514; *Norment v. Charlotte,* 85 N. C., 387, and *Clark v. Statesville,* 139 N. C., 490, where the words "qualified voters" have been used in different connections. It is a rule applicable to the construction of statutes, that where they make use of words which have a definite and well known sense in the law, they are to be received and expounded in the same sense in the statute. *Asbury v. Albemarle,* 162 N. C., 247, citing *Adams v. Turrentine,* 30 N. C., 149. As said by a very able and learned judge, whose opinion is entitled to the greatest weight, "The literal meaning of the clause (majority of the qualified voters) seems to me unmistakably to require a majority of the qualified voters, whether they voted or not." The Supreme Court of the United States adopted this view in *Harshman v. Bates County,* 92 U. S., 569, by a unanimous opinion written by *Justice Bradley.* It is true that Court afterwards, in *County of Cass v. Johnson,* 95 U. S., 360, overruled the former case as to this point, but only for the reason that the Court had in that case overlooked the decision of the Supreme Court of Missouri, from which both cases came, upon the question, by which *Chief Justice Waite* said they were bound, but no indication whatever is given in the opinion by him in the later case that any of the justices concurring in the former opinion had abandoned, or even abated, his own individual view of the matter, but there is room for clear inference that there had been no such change of mind. Two of the judges dissented, *Bradley* and *Miller, Justice Bradley* writing an able opinion, if not unanswerable, and both he and *Justice Miller* expressly adhering to their first opinion, and dissenting from the last opinion upon the ground that not even the Missouri cases had given any contrary meaning to the phrase we are considering, and, therefore, the general rule of procedure did not apply, and the Court was free to express and enforce its own independent opinion, and to give effect to its own construction of the statute, and, also, upon such construction, to declare its invalidity. The case of *State ex rel. Woodson v. Brassfield et al.*, 67 Mo., 331, directly sustains our conclusion.

We do not agree that the use of the word "vote" instead of "voters" should make any difference in the result. It means substantially the same thing. The words "vote" and "voters" are inaccurately used to express what is manifestly the meaning as heretofore held by us. "Vote" is the choice expressed at the ballot box, "ballot" the means by which it is expressed, and "voter" the person who expresses it. The proper or more exact word, perhaps, would have been "electors" instead of "voters" or "vote" in the phrase "a majority of the qualified voters," or "vote." But the intent and meaning of the Legislature is just as clear with either word, and the legislative will is not to be disappointed by the lack of rhetorical or verbal accuracy, if the meaning and intention are plainly disclosed. 36 Cyc., 1114-1127. But, without the aid of any authority or decided case, we are of the opinion that it was intended by the Legislature that all of the "qualified electors" should be counted in ascertaining whether a majority of those entitled to vote, and called "qualified voters" or "qualified vote" in the act, had actually voted.

The judgment of the court directing a permanent injunction was correct.

Affirmed.

STACY, J., having been of counsel, took no part in the decision of this case.

J. K. COTTON v. FISHERIES PRODUCTS COMPANY ET AL.

(Filed 30 March, 1921.)

1. **Appeal and Error—Instruction—Evidence—Harmless Error.**

A statement of a party's contention by the trial judge with instruction that it was not supported by the evidence, cannot be construed on appeal to prejudice the other party, upon the idea that it tended to create an impression unfavorable to him.

2. **Libel and Slander—Slander—Damages—Punitive Damages.**

In an action of slander the jury may award, in its discretion, punitive damages upon evidence tending to show that the defendant's conduct had been malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights.

3. **Same—Actionable Per Se.**

Where the employer is liable in an action of slander for the words uttered or spoken by his employee, such words, when amounting to a charge of larceny, are actionable *per se.*

4. **Same—Public Policy—Evidence—Measure of Damages.**

Punitive damages allowable in the sound discretion of the jury, in an action of slander, are on the ground of public policy, for example's sake, not because of the plaintiff's right to the money, except that it is assessed in his suit, and while the amount may not be in excessive disproportion to the circumstances of contumely and indignity present in each particular case, it will not *per se* be reduced, because as a result the plaintiff's character and standing in the community has not thereby been impaired.

APPEAL by defendants from *Daniels, J.,* at August Term, 1920, of BRUNSWICK.

Civil action for slander, brought by plaintiff against the Fisheries Products Company, Thomas H. Hayes and H. B. Therian, president and manager, respectively, of said corporation. Upon motion duly made, the court directed a verdict in favor of the defendant, Thomas H. Hayes; and there was a verdict against the other two defendants for damages in the sum of $6,500. His Honor reduced this award to $3,500, and entered judgment in favor of plaintiff for said amount. The defendant corporation and H. B. Therian excepted and appealed.

Robert W. Davis and John D. Bellamy & Sons for plaintiff.
Rountree & Carr and C. Ed. Taylor for defendants.

STACY, J. This cause was before the Court at a previous term and is reported in 177 N. C., 56. The first appeal was from a judgment overruling defendants' demurrer. This was affirmed, and the case is now before us upon exceptions noted on the trial. The material allegations, which upon the hearing were supported by evidence and the principles of law arising thereon, are fully set out and considered in the former opinion of the Court, and need not be repeated here. The case seems to have been tried in accordance with the opinion heretofore rendered and the same doctrine more recently announced in *Vincent v. Pace,* 178 N. C., 421.

The only exceptions deserving special attention are those relating to the charge on the issue of damages.

The plaintiff alleged and contended that he had suffered special damages, in that certain business negotiations which he had on hand were broken up as a result of the defendants' alleged wrongful acts. The court in its charge to the jury took occasion to mention these contentions of the plaintiff, but stated that no evidence had been offered to support this position, as there was no testimony tending to show that the matters and things complained of in this cause had been brought to the attention of the parties with whom plaintiff was negotiating. Defendants excepted to this portion of the charge on the grounds that the giving of a contention not warranted by the evidence was calculated to create in the minds of the jurors an impression that the court thought the evidence was sufficient to submit the question to them. We are unable to agree with this conclusion. The court statement that the plaintiff was making a contention unsupported by evidence would hardly be considered hurtful or prejudicial to the defendants. This was tantamount to saying that the plaintiff's contentions to this extent were not well founded. The exception must be overruled.

The defendants' eighth and last exception relates to the charge on punitive damages. The basis of this assignment is that there is no evidence from which the jury would be justified in awarding such damages, and that it was, therefore, error to instruct them upon the subject.

We think his Honor properly submitted this phase of the case to the jury for their consideration. Not only did the language of defendant's employees amount to a charge of larceny, actionable *per se* under our law, but the accompanying acts in causing plaintiff's goods to be opened publicly and searched in the presence of divers persons gave such pronounced color and tone to the entire setting of the case as to warrant the jury in assessing exemplary damages. *Bowden v. Bailes,* 101 N. C., 612.

Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendants' conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a *right* to the money, but it goes to him merely because it is assessed in his suit. In a proper case, like the one at bar, both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. R. R.*, 175 N. C., 132; *Fields v. Bynum,* 156 N. C., 413; *Hayes v. R. R.*, 141 N. C., 199; *Smithwick v. Ward,* 52 N. C., 64.

The fact that plaintiff's standing in the community has not been impaired by defendants' conduct, and that he can still show a good character, does not exonerate the defendants from their wrongful purpose. This might tend to show a smaller injury actually sustained, but a greater damage really intended. The malice, ill-will, and spite of the defendants are not *per se* reduced or mitigated by the meager results accomplished. Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon wrongs intended by the defendants. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Gilreath v. Allen,* 32 N. C., 67; *Sloan v. Edwards,* 61 Md., 100; *Bernheimer v. Becker,* 3 L. R. A. (N. S.), 221.

We have carefully examined the record, the defendants' exceptions and assignments of error and find no sufficient reason for disturbing the results of the trial.

No error.

S. M. JACKSON, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 March, 1921.)

1. **Railroads—Crossings—Contributory Negligence—Instructions—Evidence—Appeal and Error.**

   Where there is evidence tending to show that the train of the defendant at the crossing of a public road negligently ran into the automobile of the plaintiff's intestate as he was attempting to cross the track, his failure to come to a full stop before entering upon the right of way will not as a matter of law sustain a peremptory instruction in the affirmative on the issue of contributory negligence, there being evidence tending to show that the plaintiff's intestate was not negligent in other respects.

2. **Negligence—Contributory Negligence—Burden of Proof.**

   Where contributory negligence is relied upon, the burden is on the defendant to show it.

3. **Railroads—Crossings—Negligence—Signals—Warnings—Evidence—Questions for Jury.**

   Where a railroad train collided with an automobile and caused the injury complained of, where both the track and the public road were in a cut of eleven feet approaching each other at an angle so that the approach of the train could not be seen more than eleven feet from the track, and there is evidence tending to show that the train, at sixty miles an hour, had approached without signal or warning, and without heeding a sign for that purpose placed about two hundred and fifty feet from the place of the collision, it is sufficient to take the case to the jury upon the issue of actionable negligence of the defendant.

4. Instructions—Evidence.

Upon an appeal from an instruction directing a verdict for defendant, the evidence must be taken in its most favorable aspect to the plaintiff that the jury could have considered it.

APPEAL by both parties from *Guion, J.*, at November Term, 1920, of ROBESON.

The plaintiff's intestate was a farmer who was killed at a railroad crossing about a quarter of a mile from his house as he was returning home in his automobile. He was struck by the defendant's northbound express train at a point where the railroad track crosses the public road one and a half miles north of the station at Buie's.

In approaching this crossing for a distance of several hundred yards the railroad and the public road run nearly parallel, gradually converging into a "V" and at a point about 114 feet from the crossing the public road makes a sharp turn and approaches the railroad at a right angle and through a cut about 11 feet deep. The railroad approaches the crossing through a cut of about the same depth. The uncontradicted evidence is that after turning this curve, 114½ feet from the defendant's track, it was impossible to see the train running north until within 10 feet of the track. The evidence shows that when the plaintiff's intestate turned the curve at that point and started through the cut, the train was 854 feet from the crossing. The railroad cut extended 250 yards in that direction. The evidence also shows that between the track and the public road there was a very heavy growth of young pine timber, bushes, shrubbery, and other undergrowth, and that this, together with the fact that the track is constructed through a cut 11 feet deep, obstructed the vision of the plaintiff's intestate in seeing the approach of the northbound train, which was running late and at a high rate of speed, estimated at 60 miles an hour or more by the railroad employees and other witnesses.

Practically all the witnesses, including the defendant's section foreman and his helpers, testified that the engineer did not blow for the crossing, nor did he ring the bell or give any other signal. The section foreman who reported the collision indicated in his report to the company, made on the day the deceased was killed, that no signal was given. One witness, Patterson, testified that when he saw the smoke from the defendant's engine it was 854 feet from the crossing, according to measurements afterwards made, and at the same instant he saw plaintiff's intestate turn the curve and start through the cut to the crossing. He was traveling slowly, about eight or ten miles an hour. He was not seen again until after the train had passed, when he was found crushed and wounded, having been struck and thrown about 35 feet by the defendant's train. He died about ten o'clock p. m. of the same day in a hospital in Fayetteville.

Russell & Weatherspoon, McIntyre, Lawrence & Proctor, and Johnson & Johnson for plaintiff.

McLean, Varser, McLean & Stacy and G. B. Patterson for defendants.

CLARK, C. J. The court submitted three issues, as follows: (1) Was plaintiff's intestate killed through the negligence of the defendant, as alleged in the complaint? (2) If so, did plaintiff's intestate, by his own negligence, contribute to his injury and death? (3) What damages, if any, is plaintiff entitled to recover?

The court instructed the jury that if they believed all the evidence and found the facts to be as testified that they would answer the second issue "Yes," and the third issue "No," and they responded accordingly. The plaintiff excepted and appealed. The court also instructed the jury to answer the first issue "Yes," to which the defendant excepted and appealed.

There was no evidence that the plaintiff's intestate did not look and listen. There was evidence from which the defendant contends the jury should so find. There is evidence from which the jury could find to the contrary. There is no presumption in favor of contributory negligence, and the burden was on the defendant to prove it.

In *Norton v. R. R.*, 122 N. C., 929, it is said: "Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of any statute, like our own, making it a matter of affirmative defense. *R. R. v. Gentry,* 163 U. S., 366; *R. R. v. Griffith,* 159 U. S., 609."

It cannot be declared, as a matter of law, that failure to come to a complete stop before entering upon a railroad crossing is contributory negligence. In *Perry v. R. R.,* 180 N. C., 290, the Court said: "Failure to stop before crossing a railroad track cannot be declared, as a matter of law, to be contributory negligence, but it should be considered by the jury in connection with the surrounding circumstances in determining whether the party was exercising the care of one of ordinary prudence."

In *Johnson v. R. R.,* 163 N. C., 442, the Court uses the following language: "Defendant requested the court to enter a judgment of nonsuit upon the evidence, as plaintiff's intestate was guilty of such contributory negligence in driving upon the crossing without looking or listening as barred his recovery. The judge could not have done so without deciding an issue of fact, which he is forbidden to do, that being the function of the jury. Pell's Revisal, sec. 535, and cases cited in note. The evidence favorable to defendant's view of the case may be ever so strong and persuasive, but if there is a conflict of testimony it must be left to the jury, and they must find the facts."

In *Shepard v. R. R.*, 166 N. C., 544, the Court, through *Mr. Justice Hoke*, laid down the rule as follows: "Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter upon a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of danger, and not imputed to him for contributory negligence."

In *Hinkle v. R. R.*, 109 N. C., 472, substantially the same rule is stated in the following language: "Where the injured person would not have gone on the crossing but for the negligence of the engineer in failing to give the proper signal, the railroad company will be held liable in damages resulting from a collision, although the party injured may have been careless in exposing himself."

The uncontradicted evidence tended to show that the train which struck the plaintiff's intestate was running late, and at a speed of about sixty miles an hour; that there was a whistle-post about two hundred and fifty to three hundred yards south of the crossing, put there for the purpose of indicating to the engineer that the whistle should be blown for the crossing, and the bell rung; that the defendant's foreman and a crew of men were standing near the whistle-post at the time the train passed, having been forced to remove a hand-car from the track to allow the train to pass; and that no signal whatsoever was given. About one-half dozen witnesses testified that they were in close proximity to the place where the whistle should have been blown and carefully observed that no signal was given, some of these witnesses being farmers residing in the neighborhood, and some of them employees of the railroad company.

In *Jenkins v. R. R.*, 155 N. C., 203, the Court said: "It is a railroad engineer's duty to blow his whistle or ring his bell at a reasonable distance from a crossing to warn those approaching the crossing with a view of passing over the tracks."

In *Hinkle v. R. R.*, 109 N. C., 472, it was also said: "For a moving train to omit to give, in a reasonable time, some signal when approaching a highway from which a train is hidden by an embankment, cut, or curve is negligence *per se*."

The defendant put on no evidence. The jury could have found directly or by inference from the evidence taken in its most favorable aspect to the plaintiff the following state of facts:

That the space between the county road and the railroad had grown up so thickly in trees, gum bushes, alder bushes, gum trees, and pine bushes and pine trees, that the view of the deceased was completely obscured; that because of such obscurity, together with the screen afforded by the embankment on the defendant's right of way, the deceased could not see the approach of the train until within eleven feet of the "T" iron at the crossing; that the deceased was carefully driving his automobile along the public highway, approaching the crossing at a speed of not more than eight or ten miles an hour; that the deceased knew of the crossing and was driving slowly and carefully for the purpose of effecting a safe crossing, no other conclusion being reasonably assignable for the slow speed of his machine, and it being presumed that he was conducting himself as an ordinarily prudent man; that the deceased, while purposing to cross in safety, considered the danger and ooked and listened for some warning or signal of the approach of the rain, and hence reduced the speed of his automobile as additional precaution; that those in charge of defendant's train, which was running at not less than sixty miles an hour, failed and neglected to ring the bell or blow the whistle as a warning to the deceased of its approach to he said crossing; that the failure to give such warning lulled the deceased into the belief that no train was near, and that he could cross n safety, and that, so believing, he attempted to drive over the crossing, and while so doing was fatally injured, and the jury could find that the onduct of the deceased, under all the facts and circumstances, was as an ordinarily prudent man would have conducted himself under similar ircumstances, and being lulled into a state of security by the negligent onduct of the defendant, the deceased did not have the time or opportunity to save himself after passing within the danger zone.

It is true there was evidence from which the jury could have reached a different conclusion upon some of the statements in this recital, but as the evidence must be taken in the most favorable aspect to the plaintiff in which the jury could have considered and found them, it was error o direct a verdict against the plaintiff on the second issue, especially as he burden was upon the defendant to prove the affirmative on that issue. C. S., 523, and cases there cited.

Among the most recent cases on the subject directly in point are *Penninger v. R. R.,* 170 N. C., 473; *Perry v. R. R.,* 180 N. C., 290; *Kimbrough v. Hines, ib.,* 274.

There being error as to the instructions on the second issue, it is nnecessary to continue the discussion, and the case will be sent back or a new trial on all the issues.

Error.

W. H. WALLACE ET AL. v. ASHLEY WALLACE, ELISHA WALLACE, ET AL

(Filed 30 March, 1921.)

1. Estates—Rule in Shelley's Case—Wills—Deeds and Conveyances.

A limitation coming within the rule in *Shelley's case*, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument.

2. Same—Statement of Rule.

Whenever an ancestor by any gift or conveyance took an estate of freehold, as an estate for life, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs or to the heirs of his body as a class to take in succession as heirs to him, such words are words of limitation of the estate, and conveys the inheritance, the whole property to the ancestor, and they are not words of purchase.

3. Same—Descent and Distribution.

In order to an application of the rule in *Shelley's case* appreciation of the words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument.

4. Same—Heirs of the Body—Children.

The limitation to W. for life, and after his death to his heirs, if any in fee simple, and on failure thereof to his next of kin, the word "heirs" is not used in the sense of general inheritors of the estate, but in the sense of issue or children, and in such case W. takes an estate for life and the rule in *Shelley's case* does not apply.

5. Same—Next of Kin—Relationship by Blood.

In a limitation to one for life with remainder to his bodily heirs, if any, and on failure thereof to his "next of kin," the use of the words "bodily heirs" is to be taken in the sense of issue or children; and on the death of the life tenant without such issue or children, the takers, under the term "next of kin," are the nearest blood kin to the exclusion of relationship by marriage, and also of the principle of representation unless controlling expressions in the instrument show a contrary intent.

6. Same—Representation.

In a limitation to W. for life, remainder to his bodily heirs, if any, and upon failure thereof, to his next of kin, on the death of W. without such heirs or issue, under the limitation to the next of kin, without more, the brothers and sisters of W., who first take, will inherit to the exclusion of nephews and nieces of W. who are the children of deceased brothers and sisters.

APPEAL by petitioners from *Devin, J.*, at September Term, 1920, of JOHNSTON.

Special proceedings to sell land for partition, transferred on answers filed to the Superior Court, and heard on case agreed. The facts pertinent to the inquiry and his Honor's judgment thereon are set forth in the case on appeal as follows:

"It was agreed by all the parties thereto, Abell & Ward representing the petitioners; Wellons & Wellons representing the defendant, Selina Wallace; and Parker & Martin representing the defendants other than Selina Wallace, that this case be heard upon the following agreed facts, to wit:

"1. That C. A. Wallace died without birth of issue, and that Selina Wallace is the widow, and that the petitioners and other defendants, except Selina Wallace, are the brothers and sisters of the said C. A. Wallace, deceased, and the representatives of dead brothers and sisters.

"2. That the defendants, Ashley Wallace, Elisha Wallace, and R. I. Wallace, are and were at the time of the death of the said C. A. Wallace his only surviving brothers or sisters; and that all of the petitioners are the representatives and children of deceased brothers and sisters of the said C. A. Wallace; and if the lands described in the petition descend to his heirs at law, then their respective interests are as set out in the petition.

"3. That on 25 February, 1889, Elisha Wallace and wife executed to their son, C. A. Wallace, deceased, a deed for the sixty-two and one-half acres of land described in the petition, which deed is duly recorded in Book 'S,' No. 5, at page 280, of the office of the register of deeds of Johnston County, a copy of which deed is hereto attached, marked Exhibit 'A,' and made a part thereto.

"4. On 27 June, 1919, the said C. A. Wallace made a last will and testament, which was duly probated 23 August, 1919, and is recorded in Will Book No. 6, at page 529, of the office of the clerk of the Superior Court of Johnston County, a copy of which will is hereto attached, marked Exhibit 'B,' and made a part thereof.

"5. The petitioners contend that they, together with the defendants, except the said Selina Wallace, widow, are the owners as tenants in common in the aforesaid lands under and by virtue of the aforesaid deed to C. A. Wallace.

"6. That the defendants, Ashley Wallace, Elisha Wallace, and R. I. Wallace contend that they are the owners of said lands as the only surviving brothers and sisters, and being the next of kin of the said C. A. Wallace, deceased.

"7. That the defendant, Selina Wallace, contends that she is the sole owner of said lands by virtue of said will of the said C. A. Wallace, deceased.

"8. That this agreement of facts shall not interfere with the dower of the said Selina Wallace, provided, if in law she is entitled to the same."

The portion of the deed, Exhibit "A," relevant to the inquiry is as follows:

"This indenture, made 25 February, 1889, between Elisha Wallace and wife, Penny Wallace, of the county of Johnston and State of North Carolina, of the first part, and C. A. Wallace, of the same county and State above written, of the second part.

"Witnesseth, that we, Elisha Wallace and wife, do, for and in consideration of the love and good will that we have for our son, C. A. Wallace, and for his better support, do by these presents loan and set over unto him, the above said C. A. Wallace, one tract or parcel of land to have and to hold during his natural lifetime, with the exception that we, the above said Elisha Wallace and wife, hold the above said land subject to our support and protection during our natural life. And then after the death of the above said C. A. Wallace, then said land to descend in fee simple to his bodily heirs, if any, and if none, to go to his next of kin," etc.

In the will of said C. A. Wallace, Exhibit "B," the land is devised to his widow, Selina H. Wallace, for life, and at her death to the children of R. I. Wallace. And upon these facts the court rendered judgment:

"This cause coming on to be heard before Hon. W. A. Devin, Judge presiding, at the September Term, 1920, of the Superior Court of Johnston County, North Carolina, and being heard upon the pleadings and an agreed statement of facts, Abell & Ward representing the petitioners; Wellons & Wellons representing the defendant, Selina Wallace; Parker & Martin representing the defendants, Ashley Wallace, Elisha Wallace, and R. I. Wallace; and S. S. Holt representing the defendant, Elisha Wallace, upon the motion of Parker & Martin and S. S. Holt, it is considered, ordered, adjudged, and decreed that the defendants, Ashley Wallace, Elisha Wallace, and R. I. Wallace, are the sole owners in fee as tenants in common, and are entitled to the immediate possession of the lands described in the petition in this cause."

From this judgment the petitioners, the nephews and nieces and the widow, Selina Wallace, appealed.

Ed. S. Abell and Ed. F. Ward for plaintiffs.
Parker & Martin and S. S. Holt for defendants.

HOKE, J. The deed of Elisha Wallace to his son, C. A. Wallace, conveys the land in question to said C. A. Wallace, "to have and to hold during his natural lifetime, subject to a life support for the grantors, and after the death of C. A. Wallace the land is to descend in fee simple to his bodily heirs, if any, and if none, to go to his next of kin." The grantee having devised the property to his widow, remainder to the children of R. I. Wallace in fee, it becomes necessary to determine what is the nature and extent of the estate conveyed, the widow insisting that her husband took a fee simple estate under the rule in *Shelley's case.* In numerous decisions of the Court, many of them of recent date, this rule has been recognized as existent in this State, and it is held that when a limitation comes under the principle, it operates as a rule of property passing a fee simple both in deeds and wills, and regardless of a contrary intent on the part of the grantor.

In *Nobles v. Nobles,* 177 N. C., 245, the principle referred to is stated as follows: "So stated, the rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that when the terms of the instrument by correct interpretation convey the estate in remainder to the heirs of the first taker as a class, 'to take in succession from generation to generation' to the same persons as those who would take as inheritors under our canons of descent and in the same quantity, the principle prevails as a rule of property both in deeds and wills and regardless of any particular intent to the contrary otherwise appearing in the instrument," citing *Crisp v. Biggs,* 176 N. C., 1; *Cohoon v. Upton,* 174 N. C., 88; *Ford v. McBrayer,* 171 N. C., 421; *Robeson v. Moore,* 168 N. C., 389; *Jones v. Whichard,* 163 N. C., 241; *Price v. Griffin,* 150 N. C., 523; *May v. Lewis,* 132 N. C., 115; *Nichols v. Gladden,* 117 N. C., 497.

And the same position is approved and impressively illustrated in *Leathers v. Gray,* 101 N. C., 163, overruling *S. c.,* 96 N. C., 548, and where the rule as understood and more frequently presented and applied in this jurisdiction is thus stated by *Merrimon, Judge:* "That whenever an ancestor by any gift or conveyance took an estate of freehold, as an estate for life, and in the same gift of conveyance an estate is limited either mediately or immediately to his heirs or to the heirs of his body as a class to take in succession as heirs to him, such words are words of limitation of the estate and convey the inheritance, the whole property to the ancestor, and they are not words of purchase."

From these and other authorities it will be noted that in order to an application of the rule in *Shelley's case* (being contrary as it is to the expressed will of the grantor that the first taker should have a life estate only), the words "heirs" or "heirs of the body" must be taken in their technical sense, carrying the estate to the entire line of heirs, and at this time and in this jurisdiction to hold as inheritors under our canons of descent, and if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or first taker will be held to have acquired only a life estate, according to the express words of the instrument.

Thus in the case of *Puckett v. Morgan,* 158 N. C., 344, a devise to "M. of certain lands during her life, then to her bodily heirs, if any, but if she have none, back to her brothers and sisters," the Court was of opinion that, from a perusal of the entire devise, the words "heirs of the body, if she have any," with an ultimate limitation to her brothers and sisters, showed clearly that the words "heirs of the body" were not used in their technical sense, but were intended to mean children or issue, and the estate by correct interpretation was "to M. for life, remainder to her children in fee and in default of children, over to the brother and sister," citing numerous cases in support of the position. And in the subsequent case of *Jones v. Whichard,* 163 N. C., 241, a father conveyed to his son a tract of land, "to have and to hold the same to said Robert M. Jones and Martha M. Jones, his wife, during their natural life, and then to their legal bodily heirs, provided they leave any, and if not, to be equally divided among my nearest of kin," etc.

The case of *Puckett v. Morgan, supra,* was held to be controlling, and, stating the principle applicable, the Court said: "In approval and illustration of the rule as stated, there are many decisions here and elsewhere to the effect that, in order to its proper application, the words 'heirs' or 'heirs of the body' (these last by reason of our statute, Rev., 1578), must be used in their technical sense, carrying the estate to such heirs as an entire class to take in succession from generation to generation, and they must have the effect to convey 'the same estate to the same persons, whether they take by descent or purchase,' and, whenever it appears from the context or from a perusal of the entire instrument that the words were not intended in their ordinary acceptation of words of inheritance, but simply as a *descriptio personarum* designating certain individuals of the class, or that the estate is thereby conveyed to 'any other person in any other manner or in any other quality than the canons of descent provide,' the rule in question does not apply, and interest of the first taker will be, as it is expressly described, an estate for life." Citing, also, for the position, *Puckett v. Morgan,* 158 N. C., 344; *Smith v. Proctor,* 139 N. C., 314; *Wool v. Fleetwood,* 136 N. C., 460-470; *May v. Lewis,* 132 N. C., 115; *Whitesides v. Cooper,* 115 N. C., 570; *Mills v. Thorne,* 95 N. C., 362; *Ward v. Jones,* 40 N. C., 404.

The same principle was applied in the later case of *Blackledge v. Simmons,* 180 N. C., 535, the Court being of opinion that, on perusal of the entire instrument, it appeared that the words "heirs of her body" were not intended to be words of general inheritance, but were used in a more restricted sense.

Considering the present deed in view of these authorities, the estate being conveyed to C. A. Wallace for life, and after his death "to his bodily heirs in fee simple, if any, and if none, to go to his next of kin," the limitation comes directly under the decisions of *Jones v. Whichard,* 163 N. C., 241, and *Puckett v. Morgan,* 158 N. C., 344, and that line of cases to the effect that the words "heirs of body" here are used in the sense of children or issue, and the estate conveyed is to C. A. Wallace for life, remainder to his children or issue, if any, and then over. And under *May v. Lewis,* 132 N. C., 115, the limitation over being to the next of kin of the grantee, should be held as a limitation affecting his estate by confining the descent potentially to a restricted class of heirs, to wit, his "nearest of kin," and so preventing the application of the rule in *Shelley's case* on that ground. This, in our opinion, being the true construction of the deed, C. A. Wallace, under the primary limitation having only a life estate, could not pass any interest by his will, and for the same reason his widow is not entitled to dower, the husband having never been seized of an estate of inheritance. And considering the facts further, the grantee, C. A. Wallace, having died without children or issue to take under the deed, the question recurs as to who are entitled under the ulterior limitation to "his next of kin," the claimants being respectively his three surviving brothers, his widow, and the children of deceased brothers and sisters. On this question it has been held in this jurisdiction, in a long line of cases in which the question was directly considered, that these words mean "nearest of kin," and that in the construction of deeds and wills, unless there are terms in the instrument showing a contrary intent, the words "next of kin," without more, do not recognize or permit the principle of representation. *Redmond v. Burroughs,* 63 N. C., 242; *Harrison v. Ward,* 58 N. C., 236; *Davenport v. Hassel,* 45 N. C., 29; *Simmons v. Gooding,* 40 N. C., 382; *Peterson v. Webb,* 39 N. C., 56; *Henry v. Henry,* 31 N. C., 278.

In *Redmond v. Burroughs, supra,* the suggestion was made that the term "next of kin" should receive its technical meaning that was usually given it in construing the statute of distribution, so including the principle of representation, but the Court, in rejecting the suggestion, called attention to the fact that the principle of representation as it prevailed in the statute did not arise from the use of the term "next of kin," but by reason of further words appearing therein, to wit, "next of kin of equal degree, and those who legally represent them." And to show how consistently the Court has adhered to this ruling as the correct principle of interpretation, in the closing portion of his opinion in *Harrison v. Ward, supra, Manly, Judge,* speaks to the question as follows: "In the case of *Simmons v. Gooding, supra,* the Court felt constrained by the weight of authority, and we now feel constrained by that, and the force of our own decision, to hold the words 'next of kin' in the will in question to mean the 'nearest in degree,' and that the sister of the deceased brother, Benjamin, will take the slave property limited to him for life, to the exclusion of the nephew and niece.

"The able argument which has been addressed to us upon this point has caused us to consider it again more at large than we might otherwise have done, and we are again brought to the same conclusion. We do not feel at liberty to depart from the construction heretofore adopted—a construction, it may be added, which has the sanction of the most eminent judges, Thurlow, Eldon, Grant, Plumer, and others. Those who are desirous of examining the authorities upon this vexed question will find them referred to by Jarman in his treatise on Wills, vol. 2, p. 38.

"The construction which we thus put upon the will may disappoint the expectations of defendant's friends, and work a case of hardship not foreseen and not desired by the testator, but it cannot be otherwise without unsettling again the sense of words which it has given the courts great trouble to fix, and which the public interest now requires should remain so."

Again, in these and other decisions on the subject, it is held uniformly so far as examined that the term, as the equivalent of "nearest of kin," signifies "nearest of blood kin," and that relationship by marriage is not within its proper meaning. Thus, in *Jones v. Oliver*, 38 N. C., 369, the testator died leaving a will in which there was an ulterior limitation to the "next of kin of himself and of his wife." The widow having remarried and died, her husband made claim to a portion of the property as her next of kin, and it was held that the limitation was to the nearest of kin by blood, and the husband was excluded. And it was so directly held in *Peterson v. Webb,* 39 N. C., 56. The same rule prevailed in England as to the meaning of the words "next of kin." *Elmesly v. Young,* 2 Myl. K., 780; and courts of the highest authority in this country have also approved the position. *Swazey v. Jacques*, 144 Mass., 135; *Locke v. Locke et al.,* 45 N. J. Equity, 97.

In an elementary work of recognized merit, it is said that the courts in this country have very generally held that "next of kin," when unexplained by the context, means "next of kin according to the statute of distributions," but we doubt if the statement is justified as the rule of interpretation for deeds and wills. Thus, in one of the authorities sometimes referred to in illustration of such a statement, *Blagge v. Balch*, 162 U. S., 439, the Court, in upholding the principle of representation, was passing on the distribution of a portion of the French spoilation claims dependent and determined on the construction of the act of Congress controlling in the matter, and in *Seabright v. Seabright*, 48 W. Va., the Court was construing a statute excluding the evidence of certain persons in suits against "next of kin," and it was held that the scope and purpose of the statute justified and required the interpretation that the term "next of kin" should include all of those who took and held a pecuniary interest under the statute of distributions, but both of these able Courts recognized that in the interpretation of deeds and wills the principle of representation was ordinarily excluded in the use of the term "next of kin." But however this may be, it is beyond question the settled principle of construction in this State that unless the instrument shows a contrary intent the words "next of kin" mean "nearest of kin," and that the principle of representation is excluded.

There is nothing in *May v. Lewis,* 132 N. C., 115, that is in necessary conflict with this position. That was a case involving the question whether the grantee under the deed could convey a valid title, and dependent on whether the rule in *Shelley's case* applied, the limitation being to the grantee for life, and then to his heirs, if any, and if none, to revert back to his next of kin. After holding that a good title could not be presently made as the term "next of kin" might serve to withdraw the limitation from our general canons of descent, the Court, in an opinion by our former associate, *Justice Connor,* and by way of illustration, merely quoted 21 A. & E. Enc. to the effect, "That it was very generally held in the United States that the term 'next of kin' meant 'next of kin' according to the statute of distributions, meaning, no doubt, that the term meant only 'nearest of kin,' as our cases construing the statute had uniformly held. And we are well assured that this able and learned judge, who has ever evinced a wholesome regard for established precedent as affording a dependable base line for all intelligent and well ordered progress, had no intent in this casual reference to break down or set aside a long line of well considered decisions so uniform and consistent as to establish the contrary principle as a rule of property on which many titles must depend."

In accord with these principles we must affirm the judgment of the court below and hold that C. A. Wallace took only a life estate under the deed from his father, and that under the ulterior limitation to his next of kin the property belongs to his surviving brothers and sisters to the exclusion of the widow and his nephews and nieces.

Judgment affirmed.

GEORGE W. GRAY v. CENTRAL WAREHOUSE COMPANY ET AL.

(Filed 6 April, 1921.)

1. **Warehousemen— Tobacco— Public Sales— Public Interests— Court's Jurisdiction.**

Tobacco warehouses are "affected with a public interest." and the exclusion by the owners of the warehouse of one offering to sell or buy tobacco therein is unlawful.

2. **Same—Fraud—Misconduct—Exclusion of Seller.**

Should any seller or buyer misconduct himself by fake sales or purchases, or otherwise, this is a matter for prosecution in the courts. The warehouseman can not judge the matter and punish the offender by exclusion as a buyer or seller.

3. **Same—Equity—Injunction.**

Where a tobacco warehouse company has refused to receive the seller's tobacco for sale upon its warehouse floor, for "nesting" it, or so packing it as to deceive bidders and give them a false impression of its real value, an order restraining the warehousemen will be granted and continued to the hearing at the suit of the seller when the plaintiff has made out a *prima facie* case entitling him to the relief sought.

4. **Same—Boards of Trade—Rules and Regulations.**

While a board of trade of a town may make rules and regulations binding upon its members, and exclude persons from membership who violate them; this does not permit warehouses, by their rules and regulations, to exclude either as seller or buyer from their warehouse floors, any one because not a member of some prescribed organization.

HOKE and STACY, JJ., concurring in opinion upon grounds briefly outlined, and WALKER and ALLEN, JJ., concurring in result.

APPEAL by defendants from *Connor, J.*, at December Term, 1920, of LENOIR.

This is an action by George W. Gray, alleging that since 1914 he has been engaged in the business of buying tobacco sold on the floors of the tobacco warehouses located in Kinston, N. C., and up to 1920 had bought large quantities of tobacco, and that the buying of leaf tobacco upon warehouse floors is the principal business and occupation of the plaintiff, who has a license from the U. S. Government to buy leaf tobacco; that the persons, firms, and corporations named as defendants compose a voluntary association known as the Kinston Tobacco Board of Trade, which consists of several warehouses doing business respectively in said town as the Central Warehouse Company, Farmers Warehouse Company, Atlantic Warehouse, Knott Brothers Warehouse, Eagle Warehouse Company, and the New Brick Warehouse Company; that under a rule of the said board of trade no person could buy tobacco on said warehouse floors unless he were a member of the Kinston Tobacco Board of Trade; that heretofore and up to 1920 the membership fee of the said Kinston Tobacco Board of Trade was $25, which sum was so small that any person desiring to buy tobacco could easily become a member of the board of trade with the right and privilege of buying tobacco, but on 23 August, 1920, the said board of trade, the plaintiff not being present and having no notice, adopted a rule fixing the membership fee at $500 and raising the annual dues from $18.50 to $49.50, and also adopted a rule that failure to pay within ten days after notice would forfeit membership. The plaintiff further averred that though a member of the board of trade he was not present at said meeting, and had no notice thereof, and the board of trade, composed of 34 members, increased the membership fee to $500, which was exorbitant and excessive, was intended to reduce competition among the buyers by limiting the number of competing bidders; that the dominant and controlling members of the said Kinston Board of Trade are the representatives of the Imperial Tobacco Company, Export Tobacco Company, Liggett & Myers Tobacco Company, and the American Tobacco Company, and the warehouses in said town, and that the purpose of the said tobacco companies was, by diminishing competition among buyers, to purchase the tobacco upon the warehouse floors at the lowest possible price with the result that said tobacco companies would obtain tobacco at a less price than it was reasonably worth, and in this way the tobacco growers in that section of the State are compelled to take less for their tobacco than the same is fairly worth, it being the purpose and object of said combination of manufacturers to purchase the tobacco at the lowest possible price by eliminating the independent buyer or reducing the strength and number of the independent buyers, and that for that purpose said companies gave notice through the President of the Kinston Tobacco Board of Trade, he being one of the buyers for the Export Tobacco Company, to each of the said warehouses that if any of the said warehouses accepted any bid from the plaintiff for tobacco on the said warehouse floor, then the said tobacco companies, *i. e.,* the Imperial Tobacco Company, the Export Tobacco Company, Liggett & Myers Tobacco Company, the American Tobacco Company, and the other companies above named, would withdraw their buyers from said market and the floors of said warehouse offending, and not buy any tobacco offered for sale thereon, and he avers that the reason assigned for refusing the plaintiff's membership which was that he had "nested" tobacco, was a pretext and he was found guilty without giving the plaintiff an opportunity to be heard or requesting him to give information though the charge was untrue and false; whereupon the plaintiff brought this action for damages to his reputation and character and humiliation for such unjust expulsion, and denies that the defendants had the right to exclude him from buying on the floors of said warehouses, and asked for an injunction to compel them to accept bids made by him for tobacco sold upon their said warehouse floors, and deliver upon payment therefor. The defendants answered, denying some of the allegations and admitting others, and the court in its judgment granted an injunction to the hearing, finding as facts that "the defendants, Central Warehouse Company, Farmers Warehouse Company, Atlantic Warehouse Company, Knott Brothers Warehouse, Eagle Warehouse Company, and the New Brick Warehouse, are each and all public tobacco warehouses, doing business as warehousemen in the city of Kinston, and that each and every one of the said warehouses declined and refused to admit the plaintiff, George W. Gray, dealer in leaf tobacco, holding registration under United States statute, marked Exhibit 'A,' and filed in the record, to purchase or bid for tobacco upon the warehouse floors of the said respective warehouses for the reason that the said George W. Gray was not a member of the Kinston Tobacco Board of Trade, the plaintiff having been expelled upon the charge of nesting tobacco, and the court being of the opinion that the said defendant warehouses above named cannot refuse to permit plaintiff to bid whether the allegations of their answers are true or not," and restrained the above named warehouse companies and other persons named in the complaint from preventing "the said George W. Gray, the plaintiff, to bid for tobacco offered for sale upon the floors of the said respective warehouses at public auction, and to buy the same when his said bid is the highest bid therefor, and to deliver the same to him upon the payment therefor," and "consideration of the issues raised by the pleadings is continued to be heard and to be determined in due course and practice of this court and the cause is retained for further orders." From this order continuing this restraining order to the hearing the defendants appealed.

Powers & Elliott and James S. Manning for plaintiff.
Cowper, Whitaker & Allen and Rouse & Rouse for defendants.

CLARK, C. J. The only question presented is whether under the allegations of the complaint and admissions in the answer, and on the facts found by him, his Honor was justified in entering the order appealed from.

The Kinston Board of Trade is a voluntary organization, and they had the right to exclude or expel the plaintiff from membership therein with or without cause, and his Honor properly held that he did not pass upon that question, but inasmuch as the defendant warehouse companies were operating their property "affected with the public use," he rightly held that they had no power to exclude the plaintiff from buying because he was or was not a member of that organization.

The plaintiff's cause of action is not because of his exclusion from the board of trade, but because he was forbidden to buy on the floor of the warehouses, and damages for such interference with his business and because of the humiliation and damages to his business by the publicity given to the allegation that he had been expelled for improper conduct. This raises issues of fact for the jury on the question of damages, and whether the allegation by the board of trade that he had been guilty of "nesting" tobacco was truthful or not. These issues were continued to the trial to be passed on by the jury. But the court held that whether he was a member of the board of trade or not did not entitle the defendants to exclude him as a buyer, and his Honor properly continued the order restraining the defendants from excluding the plaintiff as a buyer until the hearing. The order appealed from provides that "the plaintiff is to be accepted as a buyer only when his is the highest bid and on payment."

If any one applies to a railroad or a ferry for the transportation of himself or the carriage of freight, or to an inn-keeper, or sends his corn to a public mill, or his tobacco to a public warehouse, or applies to the owners of a gas or electric power plant, or any other business "affected with a public use," it has always been a principle of the common law, and never more necessary than now, that he is entitled to absolute impartiality as to the charges and treatment. If a passenger misconducts himself, those in charge of the train can put him off, and the same is true as to any other business affected with the public use. If in this case at the trial it shall be found that the plaintiff as a seller "nested" his tobacco it would prevent any recovery for damages on the charge of humiliation caused by the publicity given by the defendants in making public that matter, for the truth is a defense to libel. Whether, if true, such conduct authorized the defendants to exclude the plaintiff as a buyer is a matter which may come up on appeal from the verdict at the trial, but we hold that his Honor was eminently correct in holding that as long as that matter was undecided, the defendants had no power to exclude the plaintiff from being a buyer at their public sales, and the injunction until the hearing was properly granted.

In *Nash v. Page*, 80 Ky., 359, the duty imposed upon public warehousemen for sale of tobacco is thus summed up: "When a warehouseman for the public sale and purchase of tobacco undertakes to sell at auction and to conduct the business of a public warehouseman he assumes an obligation to serve the entire public. He has no right to select his own bidders, nor can he refuse to receive the tobacco of producers when shipped to him. He can no more refuse to sell the tobacco of the producer at auction, or deny the right of any to bid when offered, than the owner of a stage or steamboat line may decline to take passengers or the owners of wine houses refuse to take the wine of others for storage. He cannot escape this obligation imposed by reason of the statute, and the common law by changing his appellation from public warehouseman to commission merchant." There is stated as authority for this the principles of the common law, "The sale of tobacco at auction at tobacco warehouses is a business affected with the public interest, and those carrying it on are under duties and obligations by common law to carry it on in a way that is reasonable and beneficial to the tobacco trade, and therefore they cannot discriminate or exclude buyers or sellers." This proposition is sustained by Cooley Const. Lim. (7 ed.), 870, *et seq.*, and notes. The same subject is thoroughly discussed by *Waite, Chief Justice,* in *Munn v. Illinois,* 94 U. S., 125, where it is held that: "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold," and the doctrine is there traced back to *Chief Justice Hale.* It is there also stated that it was held to apply to warehouses in *Aldnut v. Inglis,* 12 East., 527.

The same statement as to the common law as to the many different businesses where property is affected with a public use forbidding discrimination in prices or otherwise, is to be found in Bacon's Abridgement, Wait's Actions and Defenses, and *Aldnut v. Inglis,* 12 East., 527 (already quoted), and Freund on Police Power, secs. 372-394.

In *Head v. Mfg. Co.,* 113 U. S., 17, *Munn v. Illinois* was reaffirmed as to a water mill and mill-dam being affected with a public use, forbidding any discrimination as to the patrons or charges, and at pp. 17 and 18 are given the states which have by statute enlarged the common-law power in this respect, and among them this State.

One of the most informing decisions on this subject is *Publishing Co. v. Asso. Press,* 184 Ill., 438, which held: "The obligation of a corporation charged with a public interest does not arise from, nor rest upon, contracts made by it in conducting its business, but grows out of the fact that the corporation is discharging a public duty or private duty, which has been so conducted that it has become affected with a public interest."

To the same purport is *S. v. Edwards,* 86 N. C., 666, as to grist mills. In *Brass v. N. Dak.,* 153 U. S., 391, the doctrine was applied to public warehouses and *Munn v. Illinois* was reaffirmed. It had already been reaffirmed as to elevators in *Budd v. N. Y.,* 117 N. Y., 1, affirmed on writ of error, 143 U. S., 517.

The same principle as to all agencies "affected with a public use" was restated in *Mill Dam Corp. v. Newman,* 12 Pickering, 477; the same rule was applied to gas companies, *Shepard v. Gas Co.,* 6 Wis., 546; and to stock yards, *Chicago v. Rumpff,* 45 Ill., 90; to market houses, *Gale v. Kalamazoo,* 23 Mich., 345, 355, in a learned opinion by *Chief Justice Cooley.* That an auction house was held for public use was laid down in 70 E. C. L., 54.

The application of this doctrine to common carriers and other public utilities has been too often and too fully recognized to require any citations.

We have recently applied it to electric power companies, *Public Service Co. v. Power Co.,* 179 N. C., 18; *R. R. v. Power Co.,* 180 N. C., 422; *Griffin v. Water Co.,* 122 N. C., 208, and other cases.

Tobacco warehouses are public warehouses under the laws of North Carolina. Since 1895 the Legislature of North Carolina has regulated the warehouse charges, requiring that the tobacco shall be weighed by a person duly sworn; that every warehouse proprietor shall render to each seller of tobacco a bill of charges or fees for the same, and subjecting said proprietors to penalties for violations of the provisions of said statute. C. S., 5124, 5125, 5126; and since 1907 has required them to keep an account of the sales upon the floors and report the number of pounds sold each month to the Commissioner of Agriculture at Raleigh, who is required to keep record thereof and publish same in a bulletin, with penalty for failure to observe the statute both as to the warehouses and the Commissioner of Agriculture. C. S., 4926, 4927, 4928, 4929, 4930; and since then, Laws 1919, ch. 90, now C. S., 7839, requires that every tobacco warehouse shall take out a license, "Which shall be a personal privilege and shall not be transferable," specifying also the amount of tax and the duty of the Commissioner of Agriculture and the appointment of traveling auditors and making violations of the statute a misdemeanor, thus taking over the supervision of the business by the State.

Indeed, as far back as the history of the State extends the business of tobacco warehouses has been, if not a public duty, it has always been "affected with a public use." The laws of North Carolina from 1669 to 1790 have been compiled as State Records, Vols. XXIII, XXIV, and XXV, by the writer of this opinion, and in the index thereto, in the last named volume, it appears that no less than 75 statutes were enacted prior to 1790 in regard to tobacco warehouses requiring inspection, regulation, and fixing charges in such business. To the fullest extent, therefore, their regulation and control by the public has been recognized and enforced in this State.

In fact there is no subject in which the protection of the producers against extortion and combinations to reduce prices is more important. It appears from the official reports of the United States and State Governments that North Carolina in 1919 was the fourth State in the Union in the value of its agricultural products, coming after Illinois, Iowa, and Texas only. In that year the cotton crop of this State was 857,000 bales, bringing approximately $154,000,000 at the current price of 36 cents; the tobacco crop for the same year was 326 million pounds, bringing, at an average price of 50 cents, $163,000,000, being in excess of the value of the cotton crop of the State. In 1920, according to the Government and State reports, the cotton crop of the State was 936,000 bales, which at 15 cents brought only approximately $70,200,000, while the tobacco crop of 421 million pounds (in which North Carolina led all the other States) at an average price of 21½ cents brought in $90,515,000. It thus appears that the tobacco crop of the State exceeds in value even the cotton crop, and whether the charge is true or not that the excessive reduction in the price of tobacco was caused by combinations among the largest buyers, it is easy to see that if the conduct of warehouses is left to their owners, and either on their own motion or upon pressure from the large tobacco manufacturing companies they can exclude nay one from being a buyer either upon the charge of some previous moral delinquency, especially before conviction in court, or by requiring buyers to become members of a board of trade at high cost, or in any other manner, the result will be to place the tobacco farmers of the State absolutely at the mercy of these gigantic corporations, and would reduce the farmers, while nominally owners of their land, to become in reality mere tenants at will of these great monopolies, and practically peasants. The entire history of the State, and the statutes on this subject, as well as our present statutes, place the regulation of tobacco warehouses not under private control as defendants have assumed in this case, but under the control of the public authority. If they can exclude any one from being a buyer, upon one pretext or reason, they could do so upon any other, but being public warehouses they cannot forbid any one to be a buyer or seller any more than a *quasi*-public corporation, like a railroad, could refuse any one from being a shipper or a traveler over their lines upon an allegation of moral delinquency or failure to belong to some prescribed association. The matter, however, does not need discussion, as it has been fully decided.

In *Nash v. Page,* 44 Am. Rep.; *S. c.,* 80 Ky., 539, it is held: "One who assumes to carry on the business of a public warehouse for the purchase of tobacco and the public sale thereof at auction is bound to serve as such without discrimination, and cannot select bidders nor reject any producers." In the course of that opinion the Court says: "Since the formation of the State Government, the sale of this great staple has been fostered and protected by legislation. The rights and duties of the warehousemen, the buyers and sellers, and all the officers connected with the warehouses, have been defined by statute, and no other commodity has received the same protection in the way of either general or special legislation. Nine-tenths of the tobacco is sold at auction, with the right unquestioned, until the present controversy, of all parties to enter the warehouse as buyers or as sellers, by their warehousemen as their agents, and competition left unrestricted, save the option on the part of the owner to approve or reject the bid. There is no provision, it is true, in any of the statutes now in force, or that existed prior to the law as we now find it, compelling the producer of tobacco to take it to the warehouses in the city of Louisville, or to expose it for sale at public auction; but such warehouses have been always regulated by law for the benefit of the producer, as well as those who are the proprietors of these warehouses, and the latter have assumed an obligation to the public that exists so long as they continue public warehousemen. They have assumed a *quasi*-public character under the protection of the law, and will not be allowed to exercise all the privileges that have heretofore belonged to warehousemen, and evade all the duties and responsibilities of their position by the passage of a resolution disclaiming that they are operating their houses in the capacity of warehousemen, but as commission merchants."

This opinion from Kentucky, which is second only to this State in the production of tobacco, further says: "The case of *Munn v. Illinois,* 94 U. S., 113, bears directly upon the question raised in this case. In that case it was claimed that the exercise of the legislative power of the State of Illinois was in violation of the Constitution of the United States in attempting to regulate by statute the maximum charges for the storage of grain in warehouses at Chicago and other places in the State, in which grain is stored in bulk, and the grain of different owners mingled together. The right of private property, and to deal and trade as these warehousemen might see proper with those who applied to them to store their grain, was insisted upon in that case; but it was there held by *Waite, C. J.*, quoting Sir Matthew Hale in England, that 'property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.' There is manifest distinction between the manner in which the business of selling tobacco at these warehouses is conducted and that of those who are engaged in the ordinary business of commission merchants. These warehousemen now have, and always did have, in this State, public duties to perform, and to attempt to control by legislation the ordinary business of mercantile establishments in the same manner as the duties of these warehousemen are defined and regulated, would be in violation of both the Federal and State Constitutions. If the fourteen warehouses in Chicago can be regulated in their charges because of their relation to the public, the ten warehouses in the city of Louisville can be regulated in the same manner, and because the statute of this State is more liberal in its provisions toward the owners of these public warehouses than that of the State of Illinois is no argument in favor of the right of the appellants to relieve themselves of the duty they owe the public. It is conceded fact that more than five millions in value annually find its way from the producer to the warehouses in that city. The great part of this product is grown within the State, and the producer almost of necessity is compelled to place his tobacco under the control of and for sale by these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper, and to say that the proprietors, with such relations to the public, can forbid buyers to enter their auction room, and to deny to any but members of the board of trade or applicants for membership the right to make purchases, is a palpable disregard of the duty they owe to the individual patrons as well as to the public, and in the absence of any statute, is in violation of the rule of the common law. Such a public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of this case. This doctrine has been discussed and in effect settled long before the rule established in *Munn v. Illinois*, and upon the doctrine of the common law in reference to common carriers, such as steamboats, railroads, express companies, stage lines, warehouses, etc. If a public warehouseman can refuse to sell the tobacco of the producer at auction, or deny the right of any one to bid for it when offered but those whom he selects or permits to bid, why may not the owner of a steamboat or stage line, without excuse, decline to take the passenger, or the owner of the wine warehouse to receive the wine of others on storage? The steamboat is the private property of the owner; but he has engaged in a public employment, and so is the warehouseman, although not of the same character; but the undertaking of each is affected with the public interest, and for that reason the steamboat is compelled to take freight and passengers, and the warehousemen to receive and store and sell at auction the tobacco of the owner, and all are allowed to enter and compete as bidders."

A public warehouse company cannot discriminate by rejecting any one
seller or buyer. This is an obligation imposed on public warehouse-
en both by common law as well as by statute, 40 Cyc., 404; 27 R. C. L.,
1. Up until *Munn v. Illinois*, 94 U. S., 113, the railroads contested
e right of the Government to fix their rates, prescribe their schedules,
otherwise regulate their operations, but that case settled the contest
favor of the public and since then regulation has been extended and
is now undisputed. An examination of that case will show that the
ctrine was derived by analogy from the common-law right to regulate
rries, common carriers, hackmen, bakers, millers, wharfingers, inn-
epers, and the like; to regulate their charges, prescribe the accommo-
tion to be furnished, and the articles to be sold, and, above all, the
ohibition of any discrimination in the facilities to be furnished to all
ike and the charges to be made.

The correctness of his Honor's continuance of the injunction is no
ise affected, as he properly held, by the consideration whether the
aintiff was justly expelled from the board of trade or not, and it is
t a matter of consideration, even at the trial, except upon the issue as
damages for the humiliation caused by making the charge public if it
as untrue. The injunction was continued for the valid reason that
e defendants could not exclude him from being a buyer because he
as not a member of the board of trade, which is entirely independent
on his having been properly excluded or not. The injunction was
ntinued upon the ground that the warehouses being affected with a
blic use the owners could not require any discrimination by rejecting
ose who were not members of a certain organization, or requiring that
ch bidders should have paid a specified sum before they could join that
ganization, which would be a further hindrance to a numerous body
buyers. It is to the public interest that buying shall be a privilege
en to all the public. If the warehouse owners could require that the
lder must belong to a board of trade to entitle him to be a buyer
y could require that he should belong to any other organization or be
member of any church that they might designate. If they could
uire him to pay $500 to become a buyer, they could require him to
y $5,000. In short, if the public warehouses could make any require-
nts which are a discrimination they could so narrow and so restrict
number of buyers that the competition would amount to nothing,
d the farmers who raise and offer tobacco for sale would be compelled
take whatever was offered. In this lies the vital importance of this
nciple of the common law in its application to this case, and all other
es of public utilities or where private property is "affected by a
blic use."

Many principles of the common law have been eliminated or modified by the experience of the ages, with the advance of civilization, but those that have stood this test have preserved the standing of the common law as the foundation of much of our liberty. Among these last there is no principle more important to the public welfare than to preserve to every individual, however humble, the right that in dealing with public utilities and businesses "affected with a public use," there can be no discrimination against any individual in regard to uniformity of charges and impartial treatment. This principle is more important now than ever, and has been widened and not restricted by the courts and by statute. Its assertion by every one is as commendable (and even more necessary to the public welfare) as the resistance of Hampden to the collection of ship money or of the Colonists to the Stamp Tax. In this particular matter we know that the great tobacco companies have been exceedingly profitable, and that their methods were declared illegal by the Supreme Court of the United States by an unanimous opinion, *U. S. v. American Tobacco Co.*, 221 U. S., 106, quoted in *Public Service Co. v. Power Co.,* 179 N. C., 32-38. One of them, upon a capital beginning with $350,000, gathered in a very few years an aggregation of $350,000,000, in addition to heavy dividends all along, being $1,000 collected from the public for every $ the owners of the company had put into the business; and we know that even now more than one of them has been recently declaring 200 per cent dividends and more, while at the same time those who produced the tobacco are in the direst straits, in many instances not being able to defray even the expenses for the cultivation, and the fertilizer, for their product. If the tobacco warehouses can make discrimination of the kind used against this plaintiff, the producers of tobacco are henceforth hopelessly and absolutely in the power of these great corporations who control the warehouses, and can prescribe, as in this case, regulations that will rule out "independent" buyers and prevent the organization of small competing companies.

In the early history of this State, as set out in the compilation of our early laws, 23, 24, and 25 State Records, the tobacco warehouses were operated under State ownership. The present regulation is that of supervision of a business "affected with the public use." Should any seller or buyer misconduct himself as by fake sales or fake purchases or otherwise, his conduct is a matter to be settled by prosecution for disorderly conduct or other misdemeanor in the courts. The public warehouseman himself has no such power, and cannot punish him by prohibiting any seller or buyer from taking part in the sales conducted in said warehouse. To permit this would be to lay wide open the road to the exercise of an undue restriction upon trade, which, always forbidden by the common law, is now indictable under both State and Federal laws. Whether in this case there has been a combination attempted to restrict the number of buyers is a matter which can be settled only by proceedings under the State or Federal statutes, and is not before us.

This matter has been too often discussed, and is too fully settled to require an extension of this discussion. In *Munn v. Illinois, supra,* the question was the application of the principles of the common law to elevators which had a monopoly of the grain business as the public warehouses have in this State a monopoly of the sales of tobacco, and if the warehouses in Kinston can exclude any one, at their will, from buying or selling, all could do so. It is not necessary that there should be statutes regulating, on the part of the public, the conduct of these public warehouses further than the common law or the statutes have already done. It is sufficient to say that those operating them cannot impose rules or regulations which will exclude any one from selling or buying thereon equally with every one else, and on the same terms. They cannot make different charges to any one, nor exclude any one.

This action is brought for damages. The allegations that the plaintiff's expulsion was upon an unjust and unproven charge of misconduct, causing humiliation, and that being prevented from buying has caused him pecuniary loss in his business and humiliation, are denied, and are issues of fact to be settled by the jury at the trial. The judge, however, properly granted an injunction against restraining the plaintiff from being a buyer on the floor of any warehouse operated by the defendants, and in doing so he has rendered a distinct service not only to the largest agricultural interest in the State, but to the State at large.

The defendants rely upon *Godwin v. Tel. Co.,* 136 N. C., 258, where the Court upheld the refusal of an application for mandamus to place a telephone in a house where unlawful business was carried on, if an aid in carrying on the illegal business, but otherwise the corporation could not refuse the applicant. The Court in that case was careful to say that while a common carrier was not required to carry a passenger to aid in an illegal escape, or to do an illegal act, it could not refuse to convey him because he had done an illegal act. In this case the buying by the plaintiff was a perfectly lawful act in which any one was entitled to share, especially one who held, as the plaintiff did, a Federal license. The defendants could not reject or refuse any one the right to sell or to buy at a public warehouse sale or require any qualification such as membership in a board of trade or any other that would not be valid if required by a public mill or a common carrier. It is true a railroad company is a *quasi*-public corporation, and a telephone company is a public utility, but a public warehouse is at least "affected by a public use," like public mills, inn-keepers, and others. It is not necessary that there shall be statutory regulations, but it is essential that there shall not be regulations by those operating public utilities or business "affected by the public use" which will permit discrimination against any one. These requirements are based upon the principle, *"Salus populi suprema est lex"*; that is, that *the public welfare is the highest law.*

The question here presented is one of the utmost importance, not only because it presents a principle that has been recognized as settled law for centuries, but because of its great importance from a Politico-Economic standpoint, and that proposition is that public utilities, and wherever private property, by the nature of its employment, has become "affected with a public use," the owners thereof cannot discriminate as to charges or treatment of the public, who are, from the nature of the business, invited to make use thereof. There is probably no principle of the law whose maintenance in its integrity is more important to the welfare of the public than this, or whose disregard will bring greater disaster.

Government is instituted for the protection of all men and all legitimate businesses, especially the weak against the strong. One buyer could not successfully contend against a combination of buyers, or of the owners of the warehouses, which is the only place where tobacco can be sold or bought, and to permit discrimination would be to place this great agricultural industry in the absolute power of any combination, which, by reducing the number of buyers and admitting only those acceptable to great combinations, would place the producers of tobacco at their mercy.

For the same purpose of protecting the producer in the sale of the cotton crop, the General Assembly enacted the Cotton Warehouse Act, Laws 1919, ch. 168, now C. S., 4907-4925, which was held valid. *Bickett v. Tax Commission,* 177 N. C., 433.

Affirmed.

HOKE, J., concurring: I concur in the disposition made of this appeal by which the injunction is continued to the hearing, and in the opinion that these warehouses dedicated by the owners or management to the public marketing of tobacco are affected with a public use and interest so as to become the subject of reasonable public regulations. And I am inclined to the opinion that the regulations now established by the Kinston Tobacco Board, as to the selection and qualification of these buyers, may be too restrictive. Reserving final decision on that question, however, until the facts are more fully disclosed at the hearing, I am of opinion further that subject to such reasonable rules and regulations as may be established by the public agencies, and when not interfering with same, the authorities in control and management of these warehouses have the power to establish for themselves such reasonable rules and regulations as may be required to promote business efficiency and insure fair and honest dealing in the transactions occurring there, and the same may extend to the exclusion of an individual buyer or seller who has been properly shown to be guilty of dishonest practices on the warehouse floor, and such as tend to destroy the confidence of the public and patrons in the integrity of their management, and of the business methods under their supervision and control. On perusal of the record, it is alleged in the answer of defendants, and duly verified, that the plaintiff, who had been a member of the board of trade, privileged to sell and buy in these warehouses after a full and impartial hearing had been found guilty of "nesting tobacco" at one of these warehouse sales, this being a practice by which the tobacco offered for sale is so packed as to deceive bidders and give a false impression of its value, and that he was expelled from his membership and excluded from buying for that reason and pursuant to a rule to that effect established by the governing board. If these allegations should be established on the hearing, whatever may be the rights of the public and patrons generally, I am of the opinion that the present claimant, as an individual buyer, has been properly excluded, and I am well assured that no court should lend its aid to restore him to a participation in the warehouse privileges. Public policy requiring that these warehouse sales should be kept free from unreasonable restrictions, and the pertinent facts being in dispute, I think plaintiff *prima facie* has the right to take part and have his bids duly considered, and that his position should be maintained to the hearing. *Tise v. Whitaker,* 144 N. C., 508; *Cobb v. Clegg,* 137 N. C., 153. But there being material issues raised on the pleadings, which may affect both the question of liability and the amount of damages, I am of the opinion that the order must be without prejudice, and subject to the determination of these issues at the final hearing. Although this may be to some extent in the nature of a mandatory injunction, the authorities hold that a preliminary order is at times permissible in such cases, and I think this course should be pursued in the present instance. *Keys v. Alligood,* 178 N. C., 16; High on Injunctions (4 ed.), sec. 4.

STACY, J., concurring: I think the plaintiff *prima facie* is entitled to the privileges of a buyer upon the warehouse floors of the defendants, which have been dedicated to the public marketing of tobacco. I am also of the opinion that the regulation fixing membership in the Kinston Board of Trade as a prerequisite to the privilege of buying at such warehouses is unreasonable and void. However, the duty which the defendants owe to the public of maintaining a free and open market is coequal with their obligation to support and promote the principles of honesty, integrity, and fair dealing in their business. Both affect the public interest. Hence, it appearing that material issues are raised by the pleadings, which may bear upon the question of liability as well as the issue of damages, I concur in the result, and agree that the restraining order should be continued without prejudice and subject to the determination of these pertinent issues at the final hearing.

WALKER and ALLEN, JJ., concur in result upon the ground that the case ought to be more fully developed, and the issues raised by the pleadings determined before an expression of opinion on the legal questions discussed before us.

BENNIE ROE, BY HIS NEXT FRIEND, v. JAMES C. JOURNIGAN.

(Filed 6 April, 1921.)

1. Evidence—Declarations—Deeds and Conveyances—Tender—Refusal of Grantee—Res Gestae.

The grantee of a deed to the same lands had two deeds from the same grantor, his father, one reserving a life estate to another, and the other conveying the fee-simple title, reciting the cancellation of the first: *Held*, to rebut the presumption of delivery of the first deed by the fact of registration, it was competent to show by a disinterested witness, testifying directly to the fact, that the grantee had refused to accept the tender of the first deed, and what had been relevantly said at the time, as a part *of the res gestæ*, but not what was said after the first deed had been recorded.

2. Evidence—Declarations—Interest.

The declarations of a grantor of a deed in the chain of title that the grantee had refused delivery, to rebut the presumption of the delivery, are in the interest of the grantor, and those claiming under him, and are inadmissible in evidence.

3. Limitation of Actions—Deeds and Conveyances—Estates for Life—Infants.

The statute of limitations will not ordinarily begin to run against the remainderman until the falling in of the life estate, or until he becomes of legal age.

4. Deeds and Conveyances—Grantee Not In Esse—Revocation—Statutes.

The provisions of the statute, ch. 498, Laws of 1893, making revocable by the grantor his deed to persons not then in being, has no application when the deed was made prior thereto, for the rights conferred thereunder are fixed at the date of its registration.

5. Attorney and Client—Infant Parties—Counsel Fees—Allowances—Procedure—Clerks of Court.

The Superior Court judge cannot fix the compensation of the attorney for an infant party to the action and declare it a lien upon the lands in controversy, the procedure therefor being before the clerk, where the infant may be represented by a guardian, and the amount fixed subject to the approval of the proper tribunal in passing upon his accounts.

APPEAL by defendant from *Kerr, J.*, at August Term, 1920, of FRANKLIN.

This case has been before us twice heretofore, *Roe v. Journigan*, 175 N. C., 261, and *S. c.*, 179 N. C., 686.

The facts are fully stated in the first appeal, 175 N. C., at p. 262. William Roe executed a deed 26 August, 1881, to plaintiff's father, W. S. Roe, by which he conveyed to him a life estate with remainder to his then wife for life if she survived him, and then to his children. This deed was recorded 27 May, 1882. On 2 January, 1886, he made a second deed to his said son, W. S. Roe, in fee simple, for the same tract of 50 acres, which was recorded. Thereafter W. S. Roe married a second time, and died July, 1915, leaving the plaintiffs, his children by his second wife, surviving him. The controversy is as to the validity of the deed of 1881.

W. S. Roe and his second wife conveyed the land to the defendant, and the deed was duly recorded. This action by the grandchildren of William Roe, who are the children of W. S. Roe by his second wife, against Journigan, the grantee of the deed by W. S. Roe, raises the question whether the deed for life estate to W. S. Roe was ever delivered. On this trial the court excluded testimony offered, and directed a verdict for the plaintiffs, and the defendant appealed.

W. H. and Thomas W. Ruffin and W. M. Person for plaintiffs.
B. T. Holden and W. H. Yarborough for defendant.

CLARK, C. J. The real controversy in the trial is as to whether the excluded evidence was competent as tending to rebut the presumption of the delivery of the deed of 1881, which was raised by its registration. When the case was first here, 175 N. C., 261, the Court held that evidence of the declaration by W. S. Roe, that he would not accept the deed of 1881 conveying a life estate was incompetent, because he was not a party to the action, nor was he one under whom the plaintiff claims as he derives his title from the deed of William Roe and not from W. S. Roe, and if admissible at all it could only be so as a declaration against interest, which it was not, but was a self-serving declaration on the part of W. S. Roe, and therefore incompetent.

On the second appeal, 179 N. C., 686, the judge admitted the testimony of W. S. Roe to the same purport upon the ground that it appeared that W. S. Roe was not the sole heir of his father, and had moved from the land in controversy, and therefore it was not a self-serving declaration, but the Court again held there was error, because this did not show that the declaration was against the interest of the declarant.

On the trial from which this appeal is taken, the defendant offered to prove by Robert Harris that between 1881 and prior to 1886, that is, after the execution of the first deed and before the execution of the second, the witness was at William Roe's house, W. S. Roe being present; that William Roe had the deed of 1881 in his possession, and offered it to W. S. Roe, who refused to take it, saying he did not want any land unless he could have it absolutely to do as he pleased with, and that he would not take a life estate.

On both the former trials we held that what W. S. Roe *said* to another witness was not competent, because not a declaration against interest, but here the defendant offered to show what William Roe and W. S. Roe *did* in respect to the delivery of the deed, and the words accompanying such act, not as declarations against interest, but as part of the *res gestæ*, showing that in fact there was no delivery, and the defendant contends that this evidence was therefore competent. But the witness also stated that this occurrence took place about 12 months before Journigan bought the land in December, 1886 (which would have been about December, 1885), and, therefore, three and a half years after the first deed had been recorded, and we do not think the evidence of a tender and the refusal by W. S. Roe of the deed at that date was sufficient evidence to go to the jury to rebut the presumption of delivery arising from the registration of the deed, 27 May, 1882, especially when the second deed to W. S. Roe recites that it was intended as a cancellation of said first deed.

The defendant also excepts because of the rejection of the testimony of Edward L. Harris, which was offered to prove that "some time between August, 1881, and January, 1886," William Roe stated to the witness that the tract of land belonged to himself, William Roe, and that W. S. Roe had refused to accept the deed because it did not convey a fee simple estate. It does not appear, therefore, that this declaration by William Roe was made prior to the registration of the first deed; and further, it was a declaration in the interest of William Roe.

It appears that the defendant Journigan obtained a deed with full warranty from W. S. Roe in December, 1886, and has been in possession 32 or 33 years, claiming it his own in good faith, and at the time of this conveyance W. S. Roe had no children. The defendant also pleads the statute of limitations, but this deed was certainly a conveyance of the life estate of W. S. Roe, who survived until 1915, and this action was begun in November, 1915. At that time the plaintiff was, and still is, an infant. The brother was then 25 years of age, and is not a party to this action, except as a next friend to the infant plaintiff, who alone recovers. It seems to be a hardship upon the defendant, especially as under the act of 1893, ch. 498, now C. S., 996, a deed such as this, conveying an interest to a person not then in being, is revocable. It is true that according to the evidence the plaintiff has been born since the act of 1893, but the rights conferred under that deed were fixed by the statute in force at the date of its registration in 1882. *Roe v. Journigan,* 175 N. C., 263.

What the defendant may be entitled to recover for betterments placed upon the land under *bona fide* belief of the ownership of the legal title, C. S., 701, and by reason of the warranty of the father, to the extent of property, if any, descended upon the plaintiff from the estate of his father, C. S., 1741, are matters not now before us. We can only declare that the testimony offered to rebut the presumption of delivery arising upon the registration of the deed in 1882 was not sufficient to go to the jury.

The allowance of $500 to counsel for the infant is irregular, and must be stricken out. The compensation should be fixed by proper proceedings before the clerk, *Speight v. R. R.*, 161 N. C., 87, and the making the allowance a lien upon the land and directing a sale if not paid is not authorized, so far as we know, by any precedent. The counsel who so faithfully and ably represented the infant plaintiff in this case are entitled to compensation, but it must be adjusted with the guardian. It may be that the infant already has other property and a guardian, or if not, one must necessarily be appointed to take charge of the property recovered in this case, and in either event the guardian will adjust the fee with the counsel, which will be passed upon by the clerk in approving the accounts.

In *Midgett v. Vann*, 158 N. C., 130, the Court says that "Counsel fees in favor of the successful party were abolished by statute in 1871. In many states attorneys' fees are allowed the successful litigant, but it is not so in this State, and in some others, and in the Federal Court. *R. R. v. Elliot*, 184 U. S., 530; *Hyman v. Devereux*, 65 N. C., 589; *Stringfield v. Hursh*, 94 Tenn., 425. The opinion in this latter case is an elaborate discussion on this subject, and gives the states where attorneys' fees are recoverable and those where they are not, placing North Carolina in the last named list. See *Donlan v. Trust Co.*, 139 N. C., 212."

In regard to allowance of fees to counsel against their own client it was said in *Mordecai v. Devereux*, 74 N. C., 673: "The question is decided. *Patterson v. Miller*, 72 N. C., 516. This Court has never interfered between attorney and client in making allowances for professional services, and we are not inclined at this late day to assume the power to do so. We make allowances to the clerk for stating the account, or to a commissioner for making a sale, on the ground that this work is done by order of the court. We have never supposed that we could be called on to settle fees between client and the attorney, although there be a fund in the keeping of the court." In this present case there is no fund in the keeping of the court even, and this matter should be adjusted as above indicated when the infant can be represented by his guardian, subject to the approval of the proper tribunal in passing upon his accounts.

No error.

THE RALEIGH TIRE AND RUBBER COMPANY v. E. W. MORRIS AND MARY DIVERS, TRADING AS THE MORRIS AND DIVERS COMPANY, AND J. P. AND C. T. MATTHEWS, TRADING AS MATTHEWS AUTO AND ELECTRIC COMPANY.

(Filed 6 April, 1921.)

1. **Sales in Bulk—Statutes—Police Powers—Evidence—Prima Facie Case.**

C. S., 1013, regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, *prima facie* evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government, and such sale is to be regarded as *prima facie* fraudulent in the trial of an issue as to its validity.

2. **Same—Remedies of Creditors—Bona Fide Purchasers.**

When a sale of merchandise in bulk is avoided for noncompliance with the statute, C. S., 1013, the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchasers as long as the goods can be identified, or until they have passed into the hands of a *bona fide* purchaser for value without notice.

3. **Same—Identification of Goods—Subsequent Purchasers.**

The sale of merchandise in bulk is without the usual course of business, and affects the purchaser with notice of a defective title for noncompliance with the statute, C. S., 1013, as long as it can be identified and traced to any one to whom it has been transferred otherwise than in good faith and for a valuable consideration.

4. **Same—Dealers—Repairers.**

Where the dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares, under the doctrine announced in *Swift & Co. v. Tempelos*, 178 N. C., 487, for the sale of the original creditor is itself void for noncompliance with the statute, C. S., 1013.

APPEAL by plaintiff from *Kerr, J.*, at second Civil Term, 1920, of WAKE.

The action is to recover of Morris-Divers Company a balance due for goods sold and delivered, and to hold defendant, the Matthews Auto Electric Company, and its members, J. P. and C. T. Matthews, liable by reason of having bought the stock of goods of the debtor, in violation of plaintiffs' rights, and when the statute applicable to sales in bulk of such stock had not been complied with. There were facts in evidence tending to show that defendant, the Morris-Divers Company, was a partnership in Lillington, N. C., engaged in the business of selling auto supplies, etc., and in July, August, and September of 1919 they bought of plaintiffs tires and tubes for resale in their business, to the amount of $1,040. That they have paid on said account $400, and an additional $50 since suit started, leaving a balance due of $590. That while said company was so indebted, they sold out their entire stock of goods to the amount of $800 and more, including some of those bought of plaintiff, to the defendant, the Matthews Company, a partnership composed of defendants, J. P. and C. T. Matthews, and without inventory made or notice given, or otherwise complying with the statute appertaining to sales in bulk, C. S., 1013. There was also testimony on part of plaintiff permitting the inference that the goods were placed with the Morris Company on consignment to sell at retail and render an account of proceeds to plaintiff at the end of each month, and that at least $200 of the goods in question were on hand at the time of the sale to the Matthews Company.

There was evidence for defendant tending to show that the Morris-Divers Company had bought the goods outright from the plaintiff company, and there was a balance due of $590.60. There was further evidence to the effect that C. T. Matthews alone composed the Matthews Company, and that J. P. Matthews was only an employee, otherwise having no interest in the business. That defendant bought the stock of the Morris Company, paying them about $800 therefor, and that there was included in the stock about $200 of goods sold to the Morris Company by plaintiff. That the Matthews Company ran a garage and dealt in oils, gas, tires, tubes, etc., but these last were only sold to customers or patrons who had their machines repaired at the shops, and as required for properly carrying on the work of such business. During the progress of the trial it appeared that there had been no service of process on Mary Divers, and a nonsuit was taken as to her.

On an issue submitted, the jury found the amount due plaintiff from E. W. Morris to be $590.60, and the court being of opinion that the sale to the Matthews Company did not properly come within the provisions of the sales in bulk law, and that no other reason for liability had been shown, on motion, the case against the Matthews Company was dismissed, and judgment entered against Morris for the balance of plaintiff's debt as declared in the verdict.

Plaintiff excepted and appealed.

Evans & Eason for plaintiff.
Rose & Salmon for defendants.

HOKE, J., after stating the case: The sales-in-bulk act, 1st Consolidated Statutes, sec. 1013, provides in general terms that "the sale in bulk of a large part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be *prima facie* evidence of fraud, and void as against the creditors of the seller, unless a specified notice is given to creditors and inventory made within seven days before the contemplated sale. The statute contains provision, also, that if the vendor shall, before the sale, execute to a trustee a good bond available to creditors to an amount equal to the cash value of the goods in such instances, the law shall not apply. In several cases where the question was directly presented and considered, this has been approved as a valid exercise of the police powers of government, and these and other authorities also hold that sales coming within the effect and operation of the statute, and without compliance with the provisions as to the notice and inventory, are void as against creditors, and where these requirements have been met such a sale is to be regarded as *prima facie* fraudulent in the trial of an issue as to its validity. *Swift & Co. v. Tempelos*, 178 N. C., 487; *Armfield Co. v. Saleeby*, 178 N. C., 298; *Whitmore v. Hyatt*, 175 N. C., 117; *Gallup v. Rozier*, 172 N. C., 283; *Pennell v. Robinson*, 164 N. C., 257.

And when avoided as to creditors of the vendor by reason of failure to comply with the statutory requirements the goods can be made available by direct process of levy and sale in the hands of the original purchaser, and being out of the usual course of business, and so affecting him with notice, such purchaser may be held liable for their value when they have been disposed of by him under the principles recognized and applied in the well considered case of *Sprinkle v. Wellborn*, 140 N. C., 163, and either remedy may be pursued by the creditors of the vendor as against subsequent purchasers as long as the goods can be identified or until they pass into the hands of a *bona fide* purchaser for value and without notice. *Mfg. Co., v. Summers*, 143 N. C., 102. In *Sprinkle v. Wellborn, supra*, the principle is stated as follows: "The remedy of the vendor is not defeated where a fraudulent vendee has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent vendee becomes chargeable with the proceeds received from the innocent purchaser, but the property itself is not, and a personal judgment may be obtained."

And in *Summers' case, supra,* it was held, among other things, "That when property has been obtained by actionable fraud it can be followed as long as it can be identified and traced, and the right attaches not only to the wrongdoer himself, but to any one to whom it has been transferred otherwise than in good faith and for valuable consideration."

These being the recognized principles pertinent to the inquiry, it appears from the facts in evidence that the firm of Morris & Divers, dealers in automobile supplies, have sold their entire stock to the Matthews Company, and in our opinion such a sale comes directly within the provision of the statute; that the same is void as against plaintiff as creditor of the vendor, and the defendant purchasers are liable for the value of the goods included in the "stock of merchandise" of the vendors.

It is urged for defendant, the Matthews Company, that they are proprietors of a repair shop, and were not dealers in supplies generally, but only sold to customers whose machines were taken to them for repair, and that they could not properly come within the effect and operation of the statute, citing the recent case of *Swift & Co. v. Tempelos,* 178 N. C., 487, in support of their position. But apart from the testimony tending to show that these defendants sold tires and tubes and gas and oil, the question here is not what Matthews, the purchaser, has done and proposed to do with the goods, but what was the business of the vendors who sold to them, and there seems to be no dispute that this company, the original debtor, was a dealer in auto supplies. The character of the bill bought of plaintiff would of itself well-nigh suffice to establish the nature of their business, and there seems to be no dispute about it in the record. The case cited for defendant, *Swift v. Tempelos, supra,* was the sale of supplies held for the purpose of a restaurant, which were not usually disposed of directly to customers, but only used for the purpose of making their food acceptable to their individual patrons in the ordinary run of their trade and occupation, and while a bulk sale of such an enterprise was excluded from the effect and operation of the statute, it was treated as an exception coming very near to the border line, and in the well considered opinion of *Associate Justice Walker,* the inclusive character of the terms used in the statute, "a stock of merchandise," was fully recognized. In the original series of Words and Phrases, Vol. V, p. 4478, Webster's definition of "merchandise" is said to be "objects of commerce; whatever is usually bought and sold in trade or market or by merchants; wares, goods, commodities." And, citing several decided cases, the term is further there defined as including "all those things which merchants sell, either at wholesale or retail, as dry goods, hardware, groceries, drugs," etc. And again the definition is given as "commodities or goods to trade with," saying that the word came into use as designating the goods and wares sold at fairs and markets. And in the decision referred to and much relied on by defendants, and also in *Gallup v. Rozier,* 172 N. C., 283, the supplies ordinarily sold in a garage are expressly recognized as coming within the statutory terms.

The question of the liability of J. P. Matthews as one of the purchasers, or a member of the firm, etc., must be determined under the principles ordinarily applicable to his case as presented in the pleadings and evidence, but on the record we are of opinion as stated that this transaction between the Morris-Divers Company and the Matthews Auto Electric Company comes within the provisions of the statute governing sales in bulk, that the purchaser must account for the value of the goods, etc., and for the error indicated plaintiff is entitled to a new trial of the cause, and it is so ordered.

New trial.

H. MUNICK v. CITY OF DURHAM AND THE BOARD OF WATER COMMISSIONERS.

(Filed 6 April, 1921.)

1. **Municipal Corporations— Cities and Towns— Water-works— Business Enterprises—Torts—Damages.**

   The ownership and operation of a system by a city, charging its consumers for water it furnishes them, is in the nature of a business enterprise and not an act done in the exercise of governmental functions or police powers, as to which the city would not be liable for the negligence or torts of its agents or employees, unless under statutory provision to that effect.

2. **Same—Principal and Agent—Assault.**

   Where a city is engaged in supplying water to its citizens for pay, it is responsible in damages for an unjustifiable assault on one of its customers, while properly on its premises paying his water bill, by its superintendent.

3. **Same—Legal Tender—Assault.**

   The superintendent of the water-works of a city unjustifiably assaulted a customer after he had paid to another and proper employee the amount of his water bill, because he had paid a certain amount thereof in coppers, and had refused to take them from the floor where the superintendent had insultingly thrown them and pay in money in larger denominations: *Held*, the city was responsible in damages notwithstanding the sum paid in coppers was in excess of legal tender of money in that denomination.

4. Municipal Corporations—Cities and Towns—Premises—Invitation—Legal Tender.

Where a customer of a city goes into the office it has provided to pay his water bill, it is upon the implied invitation of the city, and it is required to afford him reasonable protection from its own employees and others thereon.

APPEAL by plaintiff from *Calvert, J.*, at April Term, 1920, of DURHAM.

The water-works in the city of Durham are owned by the municipality and are operated by it under the supervision of the defendant Board of Water Commissioners. Among their employees was one Harvey Bolton, who had general charge and supervision of said water system, and among whose duties it was, assisted by others under his supervision, to keep the books containing the accounts against all customers purchasing water, to render statements to said consumers for the water used by them, and collect all sums due and to give receipts upon payment of said bills.

This is an action by the plaintiff against the city for damages for assault and battery upon him by said Bolton.

The plaintiff, H. Munick, testified: "I live on Poplar Street, and conduct a grocery store. I have been living in Durham eleven years, coming here from New York. I came to New York from Russia, and am a Jew. I am married and have a family of four. I own my home and two more houses and buy water from the city of Durham. On 17 April, 1919, I went to the water company's office, taking a bill which they had sent me for $4.50. No one was with me. I had been there a number of times before and paid my bills. Sometimes I would send the money and pay the bills by the children, and sometimes I would take it myself. This time I took it myself. When I came to the office I saw only the lady who collected. This was in the spring of the year, about twelve o'clock, but I do not recall the day of the week. I do not know the name of the lady, but I took the money and the bills in my hand and handed them to the lady. I took from my pocket three paper dollars, one silver dollar, and fifty cents in pennies, and gave it to the lady with the bills. The fifty cents in pennies was in one package and were not loose. They were rolled up like the bank fixes them. I got the pennies in my retail business. The lady receipted my bills and I put them in my pocket and started to leave the office. I did not go outside of the door, and in about five minutes Mr. Bolton, who is manager of the water company, came in the office. I was standing beside the window, which is the regular place to pay bills when he came in. I had the bills then in my pocket, and the bookkeeper started counting the pennies. Mr. Bolton came in and asked the lady, 'What are you counting? nickels or dimes?' She told Mr. Bolton, 'Mr. Munick gave me fifty pennies.' Mr. Bolton then came around the counter inside the office to the desk where she was. I was on the outside by the front door. Mr. Bolton took the pennies and pushed them off the counter onto the floor where I was standing. He was at the back end of the counter and I was at the front, and he pushed all of these pennies on the floor, and came from the inside to where I was and said, 'Munick, pick up those pennies. They belong to you.' I said, 'Mr. Bolton, those pennies belong to you, not to me.' Mr. Bolton said, 'Munick, pick up those pennies; they belong to you.' I told him, 'The bill is paid, and those pennies belong to you.' That is all I said to him. I said, 'Those pennies are just as good as the dollars.' Mr. Bolton then locked the front door and took me by the jacket and called me 'a God-damned Jew,' and said, 'Give me back my bills.' I did not say anything, and he hit me in the face. I did not resist, and the door was locked and I could not get out. The pennies were still on the floor. After he slapped me another man came to pay his bill, and Mr. Bolton opened the door and let him in and the man then went out. Mr. Bolton was standing close to me and did not give me a chance to get out. Then I said, 'Please turn me loose, I have to go home.' I did not know where the other man was then. When this other man went out Mr. Bolton locked the door again, took me by my jacket and pushed me in the back room, where the tools belonging to the city water company were. I said, 'Please turn me loose,' begging him to turn me loose; I do not remember how many times. He did not close the door when he pushed me in the back room. The front door was closed, but not the door in the back room. When he got me in the back room he took his two hands about my neck and choked me. He was standing in front of me and I said, 'Please turn me loose; I've got to go home.' He turned me loose for about five minutes, and then took hold of me again, and choked me fast until it interfered with my breathing. It hurt me, and I told him to please turn me loose. When he turned me loose the second time he called to some one to bring a towel. A gentleman brought the towel and he took that towel and put it over my face. This interfered with my breathing, as I could not breathe with it over my face. A little later I told him, 'Maybe I got a dollar.' 'I will take back the pennies, Mr. Bolton; turn me loose.' I started looking in my pockets, and I found one paper dollar, and said, 'I am glad I got one dollar to settle with you.' Mr. Bolton took that dollar and gave me back the fifty pennies. I took them, and Mr. Bolton opened the front door and said, 'Get out of here, and don't come no more to pay your water bill.' That is all he said to me, and I left his office. I had been feeling mighty bad. I do not know how long I was in there, but I begged Mr. Bolton to turn me loose, as I was sick and could not stand it. I had some kind of sickness in my head. I was back there in the office being subjected to this treatment about one-half hour from the time I went in. I went to Mr. Lunsford's office and asked him to phone for me a doctor. I do not know what Mr. Lunsford said. He was busy in his office. I left his office and went home. I used to trade with Mr. Lunsford. I did not see a doctor. The treatment I had received made me sick. When he choked me it hurt me for from eight to ten days. His finger prints where he choked me could be seen on my neck by everybody for eight or ten days. Everybody asked me what was the matter. It made me feel very bad when he cursed me. I had Mr. Bolton indicted, and he was in court and the court found him guilty and fined him. He did not resist. I have Mr. Lunsford, Mr. Speed, and Mr. Draughan for character witnesses."

On cross-examination, he said: "I used to come to this water company's office before this, but had never been treated by any one that way before; and had never heard of any one being treated that way before or after I went there. This is the first time. I put my money on the counter and the young lady took the money and signed my receipt and gave me a receipt, and I put it in my pocket. I paid my bill in full, and all my matters were closed with the city. Mr. Bolton got mad because I paid the pennies. I was on the inside. I got to the door on the inside, and Mr. Bolton locked the door so I could not get out. I have never heard of folks being locked in; that was an unusual sort of thing. I do not know what he did with the key; I could not get out, and did not try. He grabbed hold of me, and I said, 'Please turn me loose.' He got madder and madder all the time. I was yelling, and he got the towel to stop me from yelling. The young lady was inside the office while this yelling was going on. She was not doing anything. I do not know who the man was that brought the towel, but he worked in the office. He did not do anything but give the towel to Mr. Bolton, I do not know his name. He was white, and not a very heavy man. I do not know him. I did not try the door. Mr. Bolton opened the door for another man, who paid his water bill, and then Mr. Bolton locked the door again. The man who brought the towel stayed there in the back. He just gave the towel to Mr. Bolton and nothing else. The young lady who I gave the money to did not do anything. She stayed there in the office, looking through the window. She was there while Mr. Bolton was cursing me, where she could hear it. I indicted Mr. Bolton in the recorder's court. He pleaded guilty, and I am suing the city, whose agent he was."

J. O. Lunsford testified that he had known the plaintiff for 12 or 15 years; had sold him flour for several years, and knew his general character, and it was good. That on the day of this occurrence the plaintiff told him about having this trouble in the water company's office.

A. J. Draughan also testified that he had known the plaintiff 10 or 12 years; that he had sold him goods, and knows his general character, and that it was good.

At the close of the above testimony the defendant offered no evidence, but moved for judgment of nonsuit, which was granted, and the plaintiff appealed.

R. O. Everett and William G. Bramham for plaintiff.
S. C. Chambers for defendants.

CLARK, C. J. The testimony for the plaintiff presents one of the most singular occurrences that has come to this Court. The defendant offered no evidence, and the nonsuit was granted on the uncontradicted testimony for the plaintiff, as above set out. It is, therefore, taken as true, with all the inferences from it in the most favorable light to the plaintiff. But indeed there seems to be but one that could be drawn from it. The plaintiff, an old and feeble man, went to the water company on receiving a notice sent by it to pay his bill. He handed the clerk the money, and she gave him a receipt. A part of the payment was fifty "pennies," that is, one-cent pieces, wrapped up together. While he was standing there and she was counting the pennies, the manager of the water company came in, knocked the pennies off the counter on the floor, cursed the plaintiff, calling him a "G—d-d—n Jew," told him to pick up the pennies, struck him, pulled him into another room, struck him repeatedly, interrupted this to admit another patron, and after the latter went out, the superintendent resumed his beating of the plaintiff, who offered no resistance, and begged to be turned loose to go home, shook him, choked him, put a towel over his face, suffocating him, and finally when the plaintiff tendered a dollar bill he told him to take his pennies and to leave and not come back.

The official (Bolton) was indicted in the criminal court and convicted and merely fined. Taking this occurrence to be as stated by the plaintiff, who is not contradicted and who proved a good character, a more brutal and unprovoked assault could not be presented. It was absolutely without justification. The pennies, under the United States statute, were a legal tender to the amount of 25 cents, U. S. Compiled Statutes, 1918, sec. 6574, and if the clerk had objected the water company could not have been compelled to receive beyond that sum in pennies, but it was no offense to tender a larger sum in one cent pieces, and the lady clerk accepted them, and even if the tender of fifty of them was for any reason objectionable (which does not appear), it certainly did not justify the treatment the plaintiff received.

There is no explanation of the conduct of the company's superintendent, and the only provocation given which we can infer from the language used by Bolton is the fact that the plaintiff was a Jew. He made no other charge. The treatment which the plaintiff received is paralleled by that which is portrayed by Scott in *Ivanhoe* in the treatment of Isaac of York seven centuries ago, and by Shakespeare as meted out to Jews in the *Merchant of Venice,* also centuries ago. The world has long outlived this treatment of an historic race, except perhaps in "darkest Russia," when under the Czars.

When Disraeli, later Prime Minister of the British Empire, was reproached in Parliament for being a Jew, he made the memorable reply, "When the ancestors of the right honorable gentleman were painted savages roaming naked in the forests of Germany, my ancestors were princes in Israel and High Priests in the Temple of Solomon."

Every voter, every witness, and every official takes an oath upon a sacred Book, every sentence and word in which was written by a Jew. When the Savior was incarnated, after the flesh he was of the tribe of Judah, and His mother, whom a great church holds immaculate, if not divine, has her name borne by millions throughout the civilized world. Whatever the shortcomings of any individual, it is strange that in this day of enlightenment such prejudices as were shown in this case should survive against the race to which the plaintiff belongs. This plaintiff proved without contradiction a good character, and certainly there is no evidence which justified in any degree the brutal assault made upon him for which no excuse is offered. For some unexplained reason the brutal assailant, though convicted, was punished only by a fine. It is to be presumed, however, that the city discharged him from its service.

The ground upon which the nonsuit was asked and allowed, as presented in this Court, is that the defendants, and the city of Durham, are not responsible for the act of its agent, Harvey Bolton, superintendent of the water-works, or that, at least, in making the assault he was not within the scope of his authority in that he had no instructions from the defendants to commit such violence. At the time that the assault was made by the said Harvey Bolton, he was acting in his capacity as agent. Had he been acting for a water company under private ownership it could not be contended that the corporation would not be responsible. He was there in the prosecution and furtherance of the duties assigned to him by the defendant municipality. *Roberts v. R. R.*, 143 N. C., 179. Indeed, the facts are very similar to those in *Bucken v. R. R.,* 157 N. C., 443, "Acting within the scope of employment means while on duty." *Cook v. R. R.,* 128 N. C., 336.

In *Ange v. Woodmen,* 173 N. C., 33, it is said: "It is now fully established that corporations may be held liable for negligence and malicious torts, and the responsibility will be imputed whenever such wrongs are committed by their employees and agents in the course of their employment and within its scope. . . . In many of the cases and in reliable text-books 'course of employment' is stated and considered as sufficiently inclusive, but whether the one or the other descriptive term is used, they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that its principal has employed or directed him to do, and in the effort to accomplish it. When such conduct comes within the description that constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for the act itself, but for the ways and means employed in the performance thereof." In 1 Thompson Negligence, sec. 554, it is pointed out that unless the above principle is maintained, "It will always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business springing from the imperfections of human nature, because done by another for which he would be responsible if done by himself. Meanwhile, the public, obliged to deal or come in contact with his agent, for injuries done by them must be left wholly without redress. He might delegate to persons pecuniarily irresponsible the care of large factories, of extensive mines, of ships at sea, or of railroad trains on land, and these persons, by the use of the extensive power thus committed to them, might inflict wanton and malicious injuries on third persons, without other restraint than that which springs from the imperfect execution of the criminal laws. A doctrine so fruitful of mischief could not long stand unshaken in an enlightened jurisprudence." This Court has often held the master liable, even if the agent was willful, provided it was committed in the course of his employment. *Jackson v. Tel. Co.,* 139 N. C., 347.

Indeed, the doctrine goes further, and the principal is liable if one coming on the premises in connection with business dealings, or by invitation, is assaulted by one of its agents. This is settled by the leading case of *Daniel v. R. R.*, 117 N. C., 592, and the numerous citations to the case in the Anno. Ed. Indeed, the same ruling has been uniformly made, and was reaffirmed at this term in *Clark v. R. R., ante*, 110.

Not only is the corporation liable for injuries thus committed by its agents, but "it is the duty of a carrier to protect its passengers from injury, insults, violence, and ill-treatment from its servants, other passengers, or third persons." *Seawell v. R. R.,* 132 N. C., 859, citing numerous cases. Indeed, as far back as 1883, *Ruffin, J.*, in *Britton v. R. R.*, 88 N. C., 544, in terms ever since deemed settled law, said: "The carrier owes to the passenger the duty of protecting him from violence and assaults of other passengers and intruders, and will be responsible for his own or his servants' negligence in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented." This is cited with approval in *Seawell v. R. R., supra.* The same rule applies to any other corporation. In that case the passenger was assaulted by a mob, and the defendant was held liable because "four employees were present and it was shown that none of them made the slightest attempt to protect the plaintiff, and indeed there was evidence that two of them actively participated in, or at least encouraged the assault." This case was reheard and reaffirmed, 133 N. C., 517, the Court saying: "A careful examination of all the authorities shows no case, and the appellants cite none, that under similar circumstances the railroad company has not been held liable, unless it exerted whatever power it could to protect the passenger from the mob," . . . adding, "The cases are uniform, fastening liability upon a common carrier for failure to exert such protection as it could to a passenger against a mob," citing numerous cases.

That the corporation is liable for the mistreatment of one invited upon its premises, as this plaintiff was, or even if it fails to protect him as far as it can from violence by others while upon its premises, is beyond controversy. Indeed, the principle is so well settled that it needs no citation of authority.

We apprehend, however, that his Honor did not nonsuit the plaintiff upon any views to the contrary, but doubtless upon the ground that the city was not liable. That contention by the defendant is equally untenable. In *McIlhenney v. Wilmington,* 127 N. C., 149, it is said: "The law is too well settled to admit of debate. It may, on review of the authorities, which are uniform, be thus stated: When cities are acting in their corporate character, or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary, or legislative authority conferred by their charters or are discharging their duty solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor," citing numerous cases. The distinction is very broad and clear, and is settled by all the authorities substantially as follows: Wherever a city is exercising a governmental function, or police power, it is not responsible for the torts or negligence of its officers in the absence of a statute imposing such liability; but when it is acting in its business capacity, as in operating a water or lighting plant or other business function, it is liable for the conduct of its agents and servants exactly to the same extent that any other business corporation would be liable under the same circumstances. The distinction thus laid down in *McIlhenney v. Wilmington, supra,* has been often cited with approval.

To sum up: The assault upon the plaintiff was of the most brutal and unprovoked nature. Indeed there is no evidence set up in this case that tends to palliate or mitigate the assault, which, it appears, was entirely unprovoked. There is no question that Bolton was the officer of the corporation, and was acting in the discharge of his duty, and that the plaintiff was on the premises at the invitation of the corporation; and further, it was the duty of the corporation not only to refrain from assaulting or injuring the plaintiff while there, but to protect him from any violence which it could reasonably have foreseen if offered by others; and still further, the city operating the water plant in its business capacity and not under its governmental or police power, on these facts the same liability was imposed upon the city as if it were a business plant.

The judgment entering a nonsuit must be
Reversed.

A. H. COSTIN v. TIDEWATER POWER COMPANY.

(Filed 6 April, 1921.)

1. Carriers—Electric Carriers—Negligence—Evidence—Proximate Cause—Public Crossings.

An electric interurban company for freight and passenger service is required, when its cars approach a public crossing, to give such signal as would be reasonably sufficient to warn persons on the public road of the coming of the car, by ringing the bell or blowing the whistle or both, if necessary; and its failure therein will be evidence of negligence, rendering it liable in damages when the proximate cause of a personal injury to a person attempting to cross the track there.

2. Same—Obstructions.

The rule making an electric carrier responsible in damages for an injury caused to one attempting to cross its track at a crossing with a public road, is more insistent where the view of motormen operating the car and also of the person injured was obstructed at the time by a building in the carrier's use and maintained by it on its right of way.

3. Same—Apparent Danger.

It is the duty of the motorman on the car of an electric carrier, in the exercise of ordinary care, to avoid a collision by stopping the car in time, when he sees or should have seen that a vehicle at a public crossing has stopped ahead of it on the track, and his negligence therein renders the carrier liable when it is the proximate cause of the injury.

4. Same—Contributory Negligence—Questions for Jury.

In an action against a carrier for damages for a personal injury sustained at a public crossing in a collision with defendant carrier's electric car, there was evidence tending to show that the defendant's motorman, in the exercise of due care, should have seen the automobile in which the plaintiff was a passenger, projecting beyond its building on its right of way in time to have stopped the car and avoided the injury complained of; that he had been signaled in time by a third person present on the occasion; that the automobile had started a short distance from the track after the plaintiff had unavailingly looked and listened, and though he continued to observe this care the train came suddenly in view from behind the building and struck the car in which he was a passenger: *Held*, the questions of defendant's negligence and the plaintiff's contributory negligence were for the determination of the jury upon appropriate issues.

5. Evidence—Opinion—Nonexperts—Admissions.

Where the defendant electric carrier by rail has practically admitted by its evidence that by the exercise of ordinary care its motorman could have stopped its car within a certain distance, which would have avoided a collision at a public crossing, the testimony of a nonexpert witness that defendant's car could have done so under the circumstances becomes immaterial.

6. Evidence—Opinion—Nonexperts—Jury.

A nonexpert witness may express an opinion, when he knows the conditions, of the distance within which the car of an electric carrier by rail can be stopped to avoid an injury, the subject of the suit; and a jury may, unaided, do so upon the evidence tending to show it.

WALKER, J., dissenting.

APPEAL by defendant from *Daniels, J.*, at the December Term, 1920, of NEW HANOVER.

This is an action to recover for alleged negligence in striking plaintiff while he was in an automobile truck crossing the tracks of the defendant at Seagate (or Greenville Sound) station, and for damage to the truck.

The allegations of negligence are:

1. That defendant had a wooden building or structure on the side of its road near Seagate station to the east of the public road, which he alleges obstructed the view of the cars on the defendant's line coming from Wrightsville Beach to Wilmington to such an extent that persons riding in automobiles were unable to see the cars until they entered upon the track.

2. That as plaintiff entered on the track in an automobile truck he was struck by a street car, and that the conductor was negligent in not keeping a proper lookout, and in not blowing his whistle.

The defendant denied the allegations of the complaint, as alleged, and set up that the plaintiff saw or could have seen the train before attempting to cross the crossing if he had stopped, looked, and listened at the proper place and time, and set up that the plaintiff was guilty of contributory negligence.

The public road crosses the track of the defendant at Seagate almost at a right angle.

On the east of the road and between it and the track there is an ice house or freight station with a platform on the side next to the track.

Mr. Gillette, a witness for the defendant, testified, among other things, as follows: "The freight station is a small enclosure, with a platform. The edge of this house or platform is eighteen feet from the center of the hard-surface road; that is, the western edge. The distance from the northern edge of the platform to the railroad track, the south rail, is six feet. The northern edge of the platform is next to the railroad, and the freight shed is on the south side of the track and on the east side of the county road. The freight station is shown on the map as an ice house. The northern end of that freight station is a platform, a portion of which is enclosed and a portion not enclosed. The unenclosed portion is the north edge of the platform. Half of it, five feet one inch, is not enclosed. From the enclosed portion of that platform to the rail is eleven and a half feet of unobstructed view. The county road coming from the south to the railroad going towards Wilmington has about one per cent down grade towards the track. The platform is three feet ten inches from the ground level to the top of the platform. . . . I should say a person standing at the platform, point 'C,' could see a train coming up the track eastward at least three hundred feet. Standing at 'C' he could see to the point marked 'T-2,' at least three hundred feet. . . . The ice house and platform combined, from north to south, is twenty-eight feet four inches long. The ice house itself is eighteen feet two inches long. . . . If this machine was beyond the platform he could probably be seen as far from a motorman on a car as the car could be seen at least two hundred feet."

The point "C" referred to by the witness is marked on the map introduced by the defendant as ten or eleven feet from the track.

The plaintiff testified in his own behalf as follows: "On 10 August, 1917, my wife and myself boarded the train at Atkinson on our way to Wrightsville Beach. We arrived in Wilmington in time to catch the eleven o'clock car out to the beach. When I purchased my ticket, I purchased a ticket to Seagate only, intending to get off there and go out to a little farm I owned on the turnpike road to the left of the track going toward the beach, and to later join my wife on the beach. The car stopped at Seagate, and I got off on the right-hand side near the little station house. The car passed on, and I noticed, standing in the western edge of the Seagate road, a truck which was about twenty-five or thirty feet, I suppose, from the track on the same side of the track that I got off. This truck was operated by Mr. Ben Harper, who lived with his father out on my place. I inquired for Mr. Harper, didn't see him around there anywhere, and I was told he was over to a cold drink stand about forty or fifty yards from the station, and I walked over there and spoke to Mr. Harper and asked him if he was going over to my place, and he said that he was. I told him I wanted to go with him, so in a very short time we walked on back toward the station. We were all the while in full view of the track below this building toward the beach down to the creek. There was no car there. No car whistle blew. Didn't hear the roar of any car, so we passed on and just before going behind the building to the truck I again looked, but there was no car there and no car whistle blew. I didn't hear the roar of any car. We walked on to the truck and I spread out a newspaper on the seat to protect my clothes and got up on the seat. Mr. Harper walked around to crank the truck and while he was going around I again looked and listened. There was no car whistle blew, didn't hear the roar of any car, didn't see any car, and he immediately cranked up the truck and we felt it perfectly safe to cross the track. Other people were going and coming and he immediately proceeded to cross the track slowly and in low gear, and just as the front wheels of the car entered the first track I noticed that the truck came to a stop at once, throwing me forward, and I looked up and saw Mr. Harper was busily engaged trying to get the car off the track, and then I immediately looked down the track and saw this car coming from behind the building at a distance of twenty-five feet, running slowly, slightly up grade. It ran on up slowly and bumped our truck suddenly, jarring it forward a distance of two or three feet, and then immediately came against it with tremendous force, everything flying up with a terrible crash, and at this point I was hit in the back. The car hit me in the back, knocking me off into the sand, and I fell into the sand. The truck was then drug ahead of the car a distance of about twenty feet towards Wilmington. The building that stood at the junction between the car line and the Seagate road is a dilapidated looking affair, and it has a platform in front of it. The platform stands about twelve inches, I suppose, from the end of the crossties, has an open space over it which readily enabled the motorman on that car, in the elevated position that he was, to see the radiator on that truck at least forty or fifty feet before he reached it, while we were sitting back on the seat of the truck we were not able to see the car until it was within a much closer distance to us."

There was other evidence that the defendant gave no signal or notice of the approach of its car to the crossing, and that the crossing was much used.

G. V. Larsen, a witness for the defendant, testified as follows: "I was at Seagate the date of this accident. I left the house and just as I came out of the door the passenger car was going down. I walked on down the middle of the road, and just before I got to the station, when I was about a hundred and fifty or a hundred and eighty feet from it, I heard a whistle blow, sound like it was on the other side of Bradley's Creek—a station blow, blowed one time. Didn't blow for any crossing at all, just blowed one time, and I went on a little further and about that time I seen a car come around the curve and Mr. Costin and Mr. Hanby and Mr. Harper was in the car. I hollered to them, but the machine was making a lot of noise, and they didn't hear me. When I hollered the second time they had started off, and I hollered a third time. I hollered the third time, and Mr. Hanby looked around. I threw up my hand to the motorman, and Mr. Hanby rolled off, didn't jump off, but rolled off. The car hit plaintiff's truck just at the windshield, drug him up the road a distance of about twenty feet right at the crossing, drug him a distance of about twenty feet. I didn't see the driver of the truck turn his truck at all. He drove out on the road and started on the track. The car hit him about where the windshield belonged. The driver jumped out of the seat over the door on the left-hand side, and Mr. Costin was mashed down between the steering wheel and the work car. He was not thrown out. Mr. Hanby took him out. I hollered at them three times. I stuck my hand out to the motorman. Nobody paid any attention to me. . . . The motorman didn't seem to pay any attention to me when I waived. He was looking out the door at me and couldn't help but see me. He said he saw me. He did not stop his car until after they hit. I think the street car was going somewhere between eight and ten miles when I first saw it, just as it came around the curve. I couldn't say whether the signal I heard was made by the freight car, it was too far off. It might have been made by a passenger car. It was a station blow. It wasn't a crossing signal. Never heard any signal given for the crossing, horn blown, or bell rung by the street car. . . . I wasn't waiving at the men on the truck. I was waiving at the fellow on the car. When I threw up my hand Mr. Hanby looked around and rolled off the truck. When I waived my hand Mr. Costin and the driver of the truck were not looking in my direction. They were kinder faced away from me. I was at right angles to them. I was in the middle of the track when I threw my hand up, about a hundred and eighty feet from where the crossing was, looking straight down the track to the approaching car. The motorman was standing in the door looking straight down the track toward me. He was looking in my direction when I threw up my hand and hollered.

"Q. I will ask you, Mr. Larsen, if that motorman had applied the brakes to his car at the moment when he saw your signal or the moment you threw up your hand and hollered, if he could have stopped that car before it reached the crossing and struck the truck? A. He could."

Defendant excepted.

The motorman testified that he blew for the crossing, and, among other things: "Just before I got to this little station you could see up and down the road each way, and I looked out and saw that the road was clear each way, and just as I got near the crossing was when I saw Larsen. He threw up his hand, but didn't realize there was anything standing behind the ice house, or anything of the kind behind the station. I shut off my current then, I was going very slow and just about the time that I got to the crossing I saw the truck, and supposed that he saw me. He turned that way, and there was a colored man I had on the line car that was sitting right on the south corner of the line, and when he turned that way he hit just back behind, possibly a foot or two behind where this man was sitting and turned and ran on the side of the road a distance of possibly fifteen or eighteen feet. When I saw the truck I immediately applied the brakes and stopped in fifteen or eighteen feet. I would judge my car was going about possibly ten or twelve miles an hour. Brakes were in good condition. There was nothing I could have done right at that time when I saw this truck coming toward the track. . . . At the time of the accident I was looking out of the window. I saw Mr. Larsen when he threw up his hand. I possibly could have stopped the car at that time before the accident."

The curve referred to by witness Larsen is one hundred and fifty or two hundred feet from the crossing.

There was other evidence sustaining the contentions of the plaintiff and defendant.

At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the ground (1) that there is no evidence of negligence on the part of the defendant; (2) that upon the whole evidence the plaintiff is guilty of contributory negligence. The motion was overruled, and defendant excepted.

The same point is presented by several prayers for instruction.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

J. H. Stringfield and McClammy & Burgwin for plaintiff.
George Rountree and Thomas W. Davis for defendant.

ALLEN, J. The exceptions chiefly relied on by the defendant is to the refusal to enter judgment of nonsuit, the defendant insisting that there is no evidence of negligence, and that upon the whole evidence plaintiff was guilty of contributory negligence.

The principles determinative of the questions raised by this exception are so well settled, and they have been discussed so recently in several cases, that it is only necessary to state them.

It was the duty of the defendant as it approached the crossing to give such signal as would be reasonably sufficient to warn persons on the public road, which crossed the track, of the coming of the car by ringing the bell or blowing the whistle, or both if necessary, and the failure to give such signal would be evidence of negligence, and this duty was more insistent because the view of the motorman and of the plaintiff was obstructed by the ice house or freight station.

It was also the duty of the defendant, after the truck stopped on the track, if a collision was probable, to stop its car, if it could do so by the exercise of ordinary care in time to avoid striking the truck.

If it failed to perform either duty it was negligence, and if there is evidence that such failure of duty was the proximate cause of the injury, the action can be maintained. *Bagwell v. R. R.*, 167 N. C., 615; *Norman v. R. R.*, 167 N. C., 533; *Goff v. R. R.*, 179 N. C., 219, and *Perry v. R. R.*, 180 N. C., 290.

Is there evidence that the defendant did not give notice of the approach of the car to the crossing, or that the truck stopped on the track, and that by the exercise of ordinary care the defendant could have discovered the danger of a collision in time to stop and avoid the injury?

The plaintiff testified that as he was approaching the track he was listening, and that he heard no signal from the approaching train, and there was other evidence to the same effect.

He also testified that the truck stopped when it reached the track; that the head of the truck could have been seen by the motorman when he was forty feet from the crossing; that he himself saw the car when it was twenty-five feet from the crossing, and that the truck had then stopped.

The witness Larsen evidently saw that a collision was imminent, because when he saw the truck approaching the crossing and the car coming, he got in the middle of the track, threw up his hands and called out three times to attract the attention of the motorman, and that when he first saw the car and threw up his hand the car was about the curve, one hundred and fifty or two hundred feet from the crossing. He also states that the motorman saw him.

The witness Gillette testified that at a point about eleven feet from the track you could see up the track in the direction the car was coming about two hundred feet.

The motorman testified that when he applied his brakes he stopped the car in eighteen or twenty feet.

Upon this evidence the jury could well find that no signal of the approach to the crossing was given; that the car which was running at eight or ten miles an hour could have been stopped in eighteen or twenty feet; that the motorman was put on notice by Larsen when one hundred and fifty or two hundred feet away that there was some danger at the crossing; that in any event the motorman could have seen the truck as it approached the crossing when forty feet away, and that he could have seen the truck after it stopped on the track twenty-five feet away, and that the car could have been stopped in eighteen or twenty feet, and if so, there was evidence to support the contention of the plaintiff that the defendant was negligent in failing to give the proper signals, and also that it could have discovered the dangerous position of the plaintiff after the car stopped in time to stop its car and avoid injury to the plaintiff.

It was also a reasonable inference to be drawn from the evidence that if the whistle had been blown it would have been heard and the truck would have stopped before it reached the track of the defendant, and that the real and proximate cause of the injury was the failure to give the signal or the failure to stop after the dangerous position of the plaintiff could have been discovered.

It was also the duty of the plaintiff to exercise ordinary care as he approached the crossing, and to use his sense of sight and hearing to the best of his ability under the surrounding circumstances, but as his view was obstructed by the ice house, which was in part on the right of way of the defendant, and a part of it used by the defendant, if the defendant failed to warn him of the approach of its train and to give the proper signals as its car approached the crossing, and induced by this failure of duty the truck approached the crossing and was struck and the plaintiff injured, he having used his faculties as best he could under the circumstances to ascertain if there was any danger ahead, negligence will not be imputed to him, but to the defendant, the failure to warn him being regarded as the proximate cause of any injury he received. *Johnson v. R. R.*, 163 N. C., 443, approved in *Goff v. R. R.*, 179 N. C., 220.

The plaintiff testified that after he reached Seagate he found a truck standing twenty-three feet from the track, which he recognized as one used on his farm, which was within a short distance of the station; that he inquired for the driver of the truck and found that he was at a cold drink stand about fifty feet from the track; that he went to the drink stand and found the driver, who said he would take him to his farm on the truck; that he then started towards the truck; that upon leaving the cold drink stand he could see down the track towards the branch; that he looked down the track at that time and saw nothing; that as he was going towards the track he looked two or three times and saw no car, nor did he hear any whistle blow; that he got on the truck, but that his view was then obstructed by the ice house; that as the driver walked around to crank the truck he looked and listened, and that he heard no car whistle, nor did he hear the roar of the car; that he looked down the track just before going behind the building going to the truck; that the truck started, and it proceeded to cross the track slowly and in low gear, and as it reached the track it stopped.

If this evidence is true, and its credibility was for the jury, the plaintiff was doing all that he could under the circumstances for his own safety, and it cannot be declared as matter of law that he was guilty of contributory negligence.

The exception to the expression of opinion by the witness Larsen that if the motorman had applied his brakes to the car at the moment when he saw your signal or the moment you threw up your hand, that the car could have been stopped before it reached the crossing, is without merit.

According to the evidence, the car was one hundred and fifty or two hundred feet from the crossing when Larsen first threw up his hand, and the motorman practically admits that he could at that time have stopped the car in time to avoid the injury, so that the evidence was about a matter that was really not in dispute.

If, however, it was otherwise, it has been held that one who is not an expert and knows of the conditions, may express an opinion of the distance in which a car can be stopped, and indeed that the jury may form its own opinion from the evidence. *Deans v. R. R.,* 107 N. C., 686.

We have examined the parts of the charge excepted to, and find that they conform to the opinions of this Court.

No error.

WALKER, J., dissenting for the reasons stated in his opinion filed in *Perry v. R. R.,* 180 N. C., 290, at 299, in regard to the duty to stop, look, and listen.

OWEN H. ROBERTS AND D. B. ROBERTS v. UTILITY MANUFACTURING COMPANY.

(Filed 6 April, 1921.)

Actions—Parties—Causes of Action—Statutes—Demurrer—Pleadings.

Causes of action may not be united under the provisions of C. S., 507, except those for the foreclosure of mortgages, unless they affect all the parties thereto, nor can they be divided under C. S., 516, when there is a misjoinder both of parties and causes of action, and when there is a cause of action alleged against one defendant assigned by him to one of the plaintiffs, and a breach of a separate contract made by him with both of the plaintiffs, and also a breach of another contract made with one of the plaintiffs, a demurrer thereto for misjoinder of parties and causes of action is good.

APPEAL by defendant from *Cranmer, J.*, from NEW HANOVER, heard at Wilson, October Term, 1920.

This is an appeal from a judgment overruling a demurrer to the complaint, the ground of demurrer being that there is a misjoinder of parties and causes of action.

Rodgers & Rodgers for plaintiff.
Langston, Allen & Taylor for defendant.

ALLEN, J. The causes of action that may be joined are classified in section 507 of the Consolidated Statutes, which concludes: "But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action."

It is also well settled that an action cannot be divided under section 516 when there is a misjoinder both of parties and of causes of action, and that in such case the demurrer must be sustained and the action dismissed. *Cromartie v. Parker,* 121 N. C., 198; *Morton v. Tel. Co.,* 130 N. C., 299; *Thigpen v. Cotton Mills,* 151 N. C., 97; *Campbell v. Power Co.,* 166 N. C., 488.

Applying these principles it is clear that the demurrer ought to have been sustained.

There are two plaintiffs, Owen H. Roberts and D. B. Roberts, and there are at least three causes of action set out, all of which do not affect all of the parties to the action, as required by the statute.

The plaintiffs allege, first, a breach of a contract made by the defendant with O. H. Roberts, and assigned by him to the other plaintiff, D. B. Roberts. Next, a breach of a separate and distinct contract made by the defendant with both of the plaintiffs, and in the third place, a breach of a contract made by the defendant with the plaintiff, O. H. Roberts.

Reversed.

ACME MANUFACTURING COMPANY v. JONAH McPHAIL.

(Filed 13 April, 1921.)

1. **Contracts, Written—Negotiations—Merger—Parol Evidence.**

Negotiations and conversations leading up to the execution of a written contract merge in the writing, and may not be received in evidence when contradictory of its terms.

2. **Same—Vendor and Purchaser.**

A written contract may not be contradicted by a parol contemporaneous agreement, and when a vendor and purchaser of merchandise have expressed in writing that freight allowance should be made to a certain point of transportation, parol evidence contemporaneous with the writing that the vendor contracted to make such allowance to a final destination is incompetent.

3. **Same—Abrogation—Annulment—Subsequent Agreements.**

The principle by which contemporaneous parol evidence is inadmissible to vary the written terms of the contract does not apply to a subsequent agreement between the parties whereby, for a consideration, the written contract has been abrogated or annulled.

4. **Same—Freight Allowances.**

The written contract between the vendor and purchaser that the former would make a freight allowance on the shipment of the merchandise to a certain point may be modified by parol evidence tending to show that since the making of the written contract they had agreed, in consideration of the purchaser's ordering out the goods, which otherwise he was not obligated to do, that the vendor would pay the freight to its destination.

5. **Same—Bills and Notes—Conditions Precedent.**

The vendor and purchaser of fertilizer entered into a written contract for the supply of fertilizer during the season should the latter order it out at a certain price, and freight allowance to a certain point *en route*, and thereafter the purchaser gave his note, including full freight to destination, for the fertilizer he had received: *Held*, parol evidence was competent to show that the notes were accepted by the vendor on condition that they were to be returned unless full freight charges to destination should be credited on them, not as contradicting the written contract, but as explaining the conditions under which the notes were given and accepted, and as tending to show that the written contract had not been consummated.

6. **Principal and Agent—Ratification—Evidence—Questions for Jury.**

While a principal will not be bound by the unauthorized acts of his agent by ratification, assent, or acquiescence therein, without knowledge of the material facts, yet where the fact of agency has been established and the principal benefited, the evidence of ratification will be liberally construed, and very slight circumstances may raise the presumption of ratification to take the case to the jury; and the evidence in this case is held sufficient.

APPEAL by defendants from *Guion, J.*, at the May Term, 1920, of NEW HANOVER.

This is an action to recover $145.47 for the wrongful conversion of certain notes and accounts, and growing out of a contract for the sale of fertilizers entered into between the plaintiff, a manufacturer of fertilizers, and the defendant, on 2 February, 1914.

By the terms of the contract the defendant did not agree to buy, but the plaintiff agreed to ship to the defendant certain fertilizers in such quantities as might be thereafter agreed upon at prices and on terms named in the contract, "shipments to be made in not less than car-load lots, and we (fertilizer company) to be at no expense after the delivery of the goods f. o. b. Dunn, N. C."

The shipments to the defendant were to be carried by rail to Dunn, N. C., and then over a logging road to the defendant, and the real dispute in this action is whether the plaintiff or the defendant should pay the freight on the logging road.

The defendant offered to show that at the time of making the contract and before it was actually signed the plaintiff agreed that it would pay the freight on the logging road if other reputable fertilizer companies did so, and that other companies did pay this freight.

This evidence was excluded upon the ground that it contradicted the written contract, it being stipulated therein that the plaintiff was to be at no expense after delivery at Dunn.

The defendant excepted.

The defendant offered evidence tending to show that before he ordered any fertilizers a salesman of the plaintiff agreed that the plaintiff would pay the freight on the logging road and the jury has found that this agreement was made by the salesman.

The plaintiff denied that the salesman had any authority to make this contract, or that it had ratified it.

His Honor charged that there was no evidence of knowledge of the contract on the part of the plaintiff, and that there was no evidence that the plaintiff had ratified the contract, and the defendant excepted.

All the fertilizers bought by the defendant were shipped after the agreement with the agent of the plaintiff and the defendant prepaid the freight on the logging road.

At the close of the season for the sale of fertilizers the account of the defendant with the plaintiff was closed by the execution of four notes aggregating $2,574.48, all of which have been paid except $145.47, the amount in controversy in this action, which substantially includes the freight on the logging road.

The defendant offered to prove that at the time of the execution of these notes he signed the notes and delivered them to the agent of the defendant upon the understanding that the notes would be returned to him, and that the plaintiff might sue on the whole account unless the plaintiff allowed him credit for the freight on the logging road.

This evidence was excluded, and the defendant excepted.

The jury, under the instructions of his Honor, returned the following verdict:

"1. After the execution of the contract for the shipment of fertilizer to defendant, did Woodward, agent for the plaintiff, agree that the company would pay the freight on the fertilizer from Dunn over the log road? Answer: 'Yes.'

"2. Did plaintiff have knowledge of such agreement, and ratify the same? Answer: 'No.'

"3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: '$145.47.'"

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant excepted and appealed.

Rountree & Davis for plaintiff.
Wright & Stevens for defendant.

ALLEN, J. Negotiations and conversations preparatory to the execution of a written contract are merged in the writing, and evidence will not be received of a contemporaneous agreement which contradicts its terms.

To do so would be "contrary to the well settled rule, as stated by the *Chief Justice* in *Walker v. Venters*, 148 N. C., 388, where he said: 'It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well settled rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man,' citing *Basnight v. Jobbing Co.*, 148 N. C., 350." *Cherokee County v. Meroney*, 173 N. C., 655.

It follows, therefore, that his Honor correctly excluded the evidence offered by the defendant tending to prove an agreement on the part of the plaintiff to pay the freight on the logging road, made at the time, because in direct contradiction of the contract, which imposed this duty on the defendant.

The principle excluding parol evidence has no application to subsequent agreements, which change or modify the original contract, and consequently it was competent to offer evidence that, after the making of the contract the plaintiff agreed to pay the freight. *McKinney v. Matthews,* 166 N. C., 580.

Nor does the rule require the exclusion of the evidence of the defendant that he delivered the notes to the agent of the plaintiff upon the agreement that the notes were to be returned, if the plaintiff refused to credit them with the amount of the freight on the logging road, such evidence being received, not for the purpose of changing or modifying the contract represented by the notes, but to show that the contract was never in existence, because the condition upon which the delivery was made had not been performed, and the evidence was very material, as the freight was included in the notes, and without explanation the defendant was in the position of trying to avoid payment of the freight when he had deliberately included the amount in his notes.

The authorities in support of this principle are numerous. See *Pratt v. Chaffin*, 136 N. C., 350; *Bowser v. Tarry*, 156 N. C., 38; *Garrison v. Machine Co.*, 159 N. C., 285, and cases cited.

We are also of opinion that it was error to instruct the jury, in the present state of the record, that there was no evidence of ratification by the plaintiff of the agreement by its agent to pay the freight on the logging road.

It is true that "In order to bind a principal by ratification, assent, or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him. He must have been in possession of all the facts, and must have acted in the light of such knowledge." 21 R. C. L., 928. And the same rule, requiring knowledge, ordinarily prevails when the contract of the agent has been performed, unless the performance shows knowledge, but "Where an agency has been shown to exist, the facts will be liberally construed in favor of the ratification by the principal of the acts of the agent, and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification, particularly where the act is for the benefit of the principal," 2 C. J., 492, and ratification may be "implied when the conduct of the principal constitutes an assent to the acts in question." 21 R. C. L., 927.

Let us then see, not whether the contract of the agent has been ratified, but is there evidence of ratification fit to be considered by a jury.

The contract was executed 2 February, 1914. The defendant did not order out any fertilizers until about the middle of March, and not until the agent of the plaintiff had agreed that the plaintiff would pay the freight on the logging road.

The defendant then sent his orders to the plaintiff for fertilizer, which showed that they were to be shipped over the logging road.

The plaintiff accepted the orders and prepaid all of the freight, which was contrary to the provisions of the contract, and in accordance with the agreement made by the agent. All of the fertilizers were shipped under this arrangement, and the freight paid by the plaintiff, and the plaintiff made no demand on the defendant to repay the logging road freight until some time in July or later.

It does not appear that the plaintiff was compelled to pay the freight in order that shipments might be made, nor is there any evidence of any custom for the manufacturers of fertilizers to prepay freight when the contract requires the purchaser to do so, and leave the question of the payment of freight for final adjustment between the parties, and on the contrary the defendant offered evidence tending to prove that consignees paid freight on shipments when the contract required them to do so, and that the manufacturer was not required to make payment in order that delivery might be made.

The letter of the plaintiff of 6 August, 1914, also furnishes some evidence that the agent was not without authority, because the plaintiff, instead of saying that the agent had no authority to make the agreement with the defendant, says that he was "without sufficient information," and it may also be inferred from it that the agent informed the plaintiff of his contract with the defendant, because it is said therein, "He was later directed to notify you that this freight would not be paid."

The fact that the plaintiff paid the logging road freight is not conclusive, and may be explained, but in the absence of explanation taken in connection with the other circumstances, it furnishes evidence for the consideration of the jury that the plaintiff consented to the modification of the contract in accordance with the agreement with the agent, and this should have been submitted to the jury.

For the errors pointed out, there must be a
New trial.

UNION GUANO COMPANY v. MIDDLESEX SUPPLY COMPANY.

(Filed 13 April, 1921.)

1. **Judgment by Default—Excusable Neglect.**

   Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. C. S., 600.

2. **Courts—Pleadings—County Courts—Statutes.**

   The provisions of C. S., 476, 505, 509, as to filing pleadings before the clerk of the Superior Court, was to expedite the trial of causes, and has no application to the county court of Forsyth, where, owing to the large volume of business on account of the size and importance of its principal city, the terms of court occur monthly, or oftener.

3. Same—Repealing Statutes.

The provisions of a special local act creating a county court, relating to the filing of pleadings, etc., are not repealed by the general statute. C. S., 8106.

4. Courts— County Courts— Jurisdiction— Process— Superior Courts— Statutes.

Sec. 9, ch. 520, Public-Local Laws 1915, creating the county court of Forsyth, providing that process of the county court, while exercising concurrent jurisdiction with justices' courts, shall not run outside of the county, "but in all other cases its process shall run as process issuing out of the Superior Court," merely authorizes service, in such other cases, to run outside of the county to the same extent as authorized for service issuing out of the Superior Court.

APPEAL by the defendant from *Finley, J.*, at April Term, 1920, of FORSYTH.

This was a motion to set aside a judgment entered at March Term, 1920, of the county court of Forsyth. The action was begun 4 February, 1920, and the summons was served 9 February, returnable to the February term of said court, which convened 23 February. The complaint, duly verified, was filed 4 February, and on 12 February, three days after service of the summons, the president of the defendant company came to Winston for the purpose of making compromise with the officials of the plaintiff company, but his offer of 50 per cent not being accepted, he wrote a letter which appears in the record, and was received by the plaintiff on 20 February, three days before the court convened, in which he agreed to send a check for the full amount on his return home. The following day the defendant's counsel wrote the plaintiff's counsel a letter, which was received on the day court met, and in reply the plaintiff's counsel notified the defendant that if the answer was not filed during the term, judgment by default on the verified complaint would be demanded. The answer was not filed, and the court did not extend the time to file the answer. On the last day of the term, and just before the adjournment of the court, judgment by default final, as appears in the record, was signed. The defendant, at the next term of said court, moved to set aside the judgment upon two grounds:

1. For excusable neglect under C. S., 600. The court held that there was no evidence of excusable neglect.

2. Upon the ground that Laws 1919, chs. 156, 277, and 304, C. S., 476, applied to the county court of Forsyth, and that the summons in this case not having been made returnable in accordance with said statutes, the judgment based thereon was void. Judge Starbuck refused the motion on this ground, also. On appeal to the Superior Court, this judgment was affirmed, and the defendant appealed to this Court.

Swink, Korner & Hutchins for plaintiff.
Hasting & Whicher and E. F. Cullom for defendant.

CLARK, C. J. It was properly held that there was no evidence to justify setting aside the judgment on the ground of excusable neglect. The only question presented is on the second ground as to the service of the summons.

C. S., 476, requiring the summons to be served within 20 days upon its face applies only to summonses "signed by the clerk of the Superior Court having jurisdiction to try the action." The county court of Forsyth was created by Public-Local Laws 1915, ch. 520.

The county of Forsyth was and is in the Eleventh Judicial District, one of the largest in the State, and the judges presiding in that district are assigned 48 weeks of court out of the 52. Forsyth is one of the most populous counties in the State, having in it the largest city in the State, and is allowed only 19 weeks in the Superior Court. The pressure of business was so serious, and it appears that the dockets had become so congested, that a litigant was fortunate to have his cause tried under three or four years. At the instance of the bar and the people of that county, the Forsyth County Court was created in 1915, with exclusive jurisdiction in contract and tort up to $1,000, except that it is concurrent with the justice of the peace to the limit of their jurisdiction. Since that time the jurisdiction of the court in contract and tort has been extended to $2,000. Sec. 4 provides for a term of that court once every month, and oftener if the judge shall find it necessary to convene an extra term. Sec. 7 provides, "That all actions shall be commenced in said court by summons, running in the name of the State, and issued by the clerk of said court returnable to the first term after service: *Provided*, the service shall be had ten days from such term." In sec. 9 it is provided that process of the court, while exercising jurisdiction which is concurrent with that of the justice of the peace, shall not run outside of Forsyth County," but, "In all other cases its process shall run as process issuing out of the Superior Court," which evidently merely authorizes service, in such cases, outside the county.

The defendant's contention is that the words, "In other cases its process shall run as process issuing out of the Superior Court," means that the subsequent act of 1919, now C. S., 476, restoring the former system of civil procedure by which summonses in the Superior Court were again made returnable before the clerk, applies also to the county court of Forsyth, especially because sec. 11 of the act creating this court authorizes rules of practice, and sec. 17 provides that, "The procedure of the Forsyth County Court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on Civil Procedure in the Revisal . . . in so far as the same may be adapted to the needs and requirements of the said Forsyth County Court."

The public-local act creating the county court of Forsyth provides that its process shall be made returnable to the terms of the court and the restoration of the procedure in the Superior Court to conform to the original code of procedure, by which process in the Superior Court is made returnable before the clerk, by its terms has no reference to any other process except summonses signed by the clerk of the Superior Court. The statute, ch. 304, Laws 1919 (now C. S., 476), provides: "The summons in all civil actions in the *Superior Court* shall be made returnable before the clerk at a date named therein." Besides, C. S., 8106, especially provides: "The Consolidated Statutes shall not have the effect to repeal any public-local statute, any public statute which affects only a particular locality," etc.

Nor is there anything in the history of the legislation restoring the original provisions of the code of civil procedure as to the service of summons which requires its application to any summons other than those in the Superior Court. *Campbell v. Campbell,* 179 N. C., at p. 416. Many people in this State were very much involved pecuniarily as one of the results of the great Civil War, and instead of expediting, at that time, the decision of litigation there was a general desire to delay judgments in civil cases, and consequently what is known as the "Batchelor Act" was passed by which summonses were made returnable to the terms of the court. This continued until the congestion of business in the Superior Courts became so serious that the "Crisp Act" of 1919, now C. S., 476, 505, 509, etc., was enacted restoring the original procedure by which summons in the Superior Court was made returnable before the clerk in order to expedite business.

There is nothing in the language of that statute which extends it beyond the Superior Court, and in addition to C. S., 8106, prohibiting the provisions of the Consolidated Statutes being held to repeal public-local statutes, the mischief to be remedied does not justify such extension by judicial construction unless clearly expressed.

As county courts of Forsyth are held 12 times a year and oftener, the summons in those courts are served much more promptly and business is greatly expedited by the procedure there in force. Consequently, there was no delay which required expediting the return of process as in the Superior Court, and indeed the application of that statute to the county court of Forsyth, instead of expediting would retard and delay in many instances the procedure in that court.

The experience of the bar and the people with the county court of Forsyth, operating in one of the most populous counties, including, as it does, the largest city in the State, under its efficient and able presiding officer has been so satisfactory that no amendment has been asked in the statute creating that court, and there has been no legislation which requires the application of the general statute in regard to service of processes in the Superior Court to the county court of Forsyth.

We therefore think that the judgment of that court was properly affirmed on appeal by Judge Finley in holding that the service of process in this case was regularly made, and that there was no ground upon which the judgment by default could be set aside as irregular.

Affirmed.

L. P. TYREE, ADMINISTRATOR, v. GEORGE C. TUDOR ET AL.

(Filed 13 April, 1921.)

1. **Principal and Agent—Father and Son—Automobiles—Negligence of Son.**

   Where the son of an owner of an automobile has his son to operate it as his chauffeur, both for business purposes and for the comfort and pleasure of his family, and there is evidence that he has given his permission for his son, just over sixteen years of age, to use it in escorting the plaintiff's intestate, a young girl of about the same age, to a dance, it is sufficient upon the question of the fact of the agency of the son that would bind the father for his negligence which proximately caused the death of the intestate when returning from the dance in the automobile.

2. **Same—Duty of Principal—Selection of Agent.**

   Where the father has given permission to his son to use his automobile for the purpose of the son to escort a young girl to a dance, the son being slightly over sixteen, and there is evidence that the son usually acted as the chauffeur of his father for business and social purposes, it was the duty of the father not to entrust the safety of the young girl to his son unless he knew that he was careful and prudent in the operation of the machine, and he is responsible in damages for the death of the girl, proximately caused by his son's recklessness in driving the machine while acting as escort.

APPEAL by plaintiff from *Finley, J.*, at November Term, 1920, of FORSYTH.

The defendant, George C. Tudor, is the father of Bynum Tudor, who at the time the plaintiff's intestate was killed in the automobile wreck was something over sixteen years of age, "living at the home of his father and under his care, custody, and control." George C. Tudor was the owner of two automobiles, which he kept on his premises for business purposes and for the comfort and pleasure of his family—one a large Hudson touring car and the other a Buick 6 roadster. Bynum Tudor was the chauffeur for the family—drove both of the cars—sometimes driving out with his mother in the large car and at other times with his father in the small car, and at other times alone; sometimes driving alone in the large car, and at other times in the Buick 6 roadster.

On the night of 19 June, 1918, there was a dance for the young people at the Country Club, which was situated on a concrete road, about three miles west of Winston. Bynum Tudor invited Ruth Tyree, the plaintiff's intestate, a young girl nearly sixteen, to go in the car with him, and it is admitted in the pleadings that he procured the consent of his father to use the Buick 6 roadster for the purpose of taking her to the dance. There is evidence that he asked permission of his father to use the large car, but his father required him to take the small car. After the two young people arrived at the dance it is in evidence that he did not dance, but while the others were dancing he was driving his car on the concrete road extending from Winston to the Country Club, at a speed of 50 to 60 miles an hour, sometimes racing with other automobiles and sometimes with motorcycles.

The dance broke up about one o'clock a. m., and Bynum Tudor was among the last to leave the club. In this car, besides himself as chauffeur, was his older brother George, and Ruth Tyree. The evidence is that he drove at a speed of 50 to 60 miles an hour—with the sparks coming out of the Buick's manifold some seven or eight inches long, passing car after car on this crowded thoroughfare on his way to the city. In passing Martin Goodman's car at this speed he turned in too short and side-swiped the Goodman car. The impact of the light Buick 6 roadster with the heavier car of Goodman threw the Buick roadster out of the road, whirling it over and over through the barbwire fence into a field alongside the road, cutting down three posts, one of them six inches square, throwing the car 36 feet, leaving it upside down with its wheels in the air, and its front pointed in the opposite direction to that it was going. Bynum and his elder brother, who was in the car with them, were thrown out in a senseless condition, and the body of the young lady was found hanging on the strands of the barbwire fence in a condition so distressing and mangled that one of the men who attempted to move it fainted. Her practically lifeless body was rushed to the hospital, where she died almost immediately. Its condition was such that the authorities would not permit her parents to view it.

The road was 50 feet wide, 20 in the center being concrete and 15 feet on each side being dirt road. Goodman testified that he was driving on the right-hand side of the concrete in two feet of the edge, and that Tudor came up from behind without blowing any horn and struck his car, and at the time going probably 60 miles an hour. The distance to which Tudor's car was thrown is also some evidence of the great speed he was going. There was evidence that Tudor was in the habit of driving his father around town in his car.

At the close of the plaintiff's evidence, the court rendered a judgment of nonsuit, and the plaintiff appealed.

Swink, Korner & Hutchins and Jones & Clement for plaintiff.
Manly, Hendren & Womble, Parrish & Deal, and Holton & Holton for defendant.

CLARK, C. J. The plaintiff bases his cause of action upon the relation existing between George C. Tudor and his minor son as master and servant in two aspects:

1. That on this trip Bynum Tudor was acting as chauffeur under or with the consent and approval of George C. Tudor.

2. That where the parent maintains an automobile for social purposes by his family, he should be held liable for an injury sustained through its negligent operation while being used by a member of the owner's family, upon the theory that the car, under such circumstances, is being used for the purpose for which it was kept, and that the person—a member of the family—is operating it as the owner's agent. This includes cases where the parent keeping the automobile for the comfort and pleasure of his family, a member of the family who is authorized, expressly or impliedly, to use it for such purpose by his negligent operation of it causes an injury to another. This renders the owner liable.

This court has often held that the mere fact that the defendant, the owner of the car, was the father of Bynum Tudor does not make him liable in damages for his acts. *Linville v. Nissen*, 162 N. C., 95; *Bilyeu v. Beck*, 178 N. C., 481; but in *Linville v. Nissen, supra*, the father not only did not authorize, but expressly forbade, his son to use the machine, and in *Bilyeu v. Beck, supra*, the daughter acting as chauffeur was more than 21 years of age, and the evidence tended to show that she was acting solely for herself and not in any manner for her father or by his permission. In *Wilson v. Pope*, 175 N. C., 490, the evidence was that the owner was in the car at the time of the injury, and was going for her own purposes to her farm.

On the other hand, in *Clark v. Sweaney*, 175 N. C., 280; reaffirmed on rehearing, 176 N. C., 529, the minor son was driving the automobile with the implied consent of his father, who was therefore held liable for his negligence. This consent was implied by the fact that the automobile was purchased for the use of the family and the minor son was permitted to operate it as a member of the family and had his mother with him in the automobile and the father was held responsible. In the present case permission was expressly given to the son to use the car for a social purpose, and his invitation to the young lady to go with him was extended by the permission of his father to him to use the car for that purpose. He also carried in the car his older brother, and was in the habit of driving his father in this car.

In *Brittingham v. Stadiem,* 151 N. C., 300, it was held that while the mere relationship of parent and child does not make the former liable for damages for the tort or negligent act of the other, the parent is liable when he authorized or permitted the child to do the act, or the child was acting as his servant or his agent. In that case the defendants employed their 12-year-old son as a clerk in a pawn shop, where, among other things, second-hand pistols were dealt in, and while the boy was carelessly handling a pistol on which a loan was asked, he unintentionally shot and injured another customer in the store, and it was held sufficient to submit the case to the jury upon the question of the parents' actionable negligence.

In *Taylor v. Stewart,* 172 N. C., 203, the Court held that it is negligence *per se* for one under the prohibited age (16) to run an automobile; still the father would not be liable unless the negligence of the minor son was the proximate cause of the injury, and that while ordinarily a father is not held responsible for the injury caused by the negligence of his minor son done without his knowledge and consent, such consent could be inferred in that case. In that case *Brown, J.,* says as follows: "A somewhat similar case has been decided in South Carolina, where it is held that where a person provided an automobile for the pleasure of his family, which his son was authorized by him to operate, he is responsible for his son's negligence when driving the car for the pleasure of himself and friends." *Davis v. Littlefield,* 97 S. C., 171.

On the second appeal, in *Taylor v. Stewart,* 175 N. C., 199, the verdict in favor of the father was sustained, there appearing evidence that "The death of plaintiff's intestate was an unavoidable accident, which a prudent chauffeur, authorized by law to run a machine, could not by exercising reasonable care, have avoided."

In the case at bar it is admitted in the answer that Bynum Tudor was acting as an escort for the plaintiff's intestate, taking her to and bringing her home from the dance, and that as a result of a collision the plaintiff's intestate received injuries from which she died, and it is also in evidence that the defendant, George C. Tudor, the day after the occurrence stated that his son Bynum had asked his permission to take his car to carry Ruth to the dance at the Country Club, and wanted his large car, but the father had another engagement that night and could not let his son have that car, but he did let them have his small car to take Ruth to the Country Club to the dance. There was ample evidence to go to the jury, if believed, that the negligence of Bynum was the proximate and indeed the sole cause of the injury.

Upon the evidence the plaintiff was driving the car by the permission of the father, knowing that it was to be used for the conveyance of the young lady to and from the dance, a social purpose. He was therefore operating the car as the servant of his father, and for the negligent injuries inflicted by him his father was responsible, it being within the scope and purposes for which the car was bought and used. There being evidence that the negligence of the son was the proximate cause of the death, the case should have been submitted to the jury.

In another recent case, *Reich v. Cone,* 180 N. C., 267, the owner of an automobile, who had loaned his machine to his servant to use solely for his own purposes, was held not liable in damages for the servant's negligence, because it appeared that the servant was competent to drive the car, and it was not being used by him in the employer's service. In the present case the car was being used for the social purposes of the family, and with the knowledge and consent of the father for that purpose, and there is no evidence that the minor son was competent to drive the car. Indeed, the evidence of his conduct that night, and in this very occurrence, tends to prove that he did not have sufficient discretion for that purpose, and his father is liable on that ground, also, if the jury should so find the fact. It was his duty not to entrust the safety of the young lady to his son unless he knew that he was careful and prudent in the operation of the machine. To hold otherwise would be dangerous to the safety of life and limb.

We will not lengthen this discussion by citations of numerous authorities from other states in which the decisions cannot all be reconciled or cases where the facts may more or less differ from the one at the bar.

Upon our own authorities, and upon the reason of the thing, we think this case should have been submitted to the jury, and the judgment of nonsuit is

Reversed.

MRS. ANNE COMBS, ADMINISTRATRIX OF A. L. COMBS, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 20 April, 1921.)

1. **Insurance, Life—Principal and Agent—Fraud—Premiums—Misrepresentations—Evidence.**

Evidence that the agent of the insurer, after urging the insured to pay his premium on his life insurance policy soon to become due, and not let it lapse, is informed by the insured that he doubted that he could keep the policy in force, as he had developed a case of tuberculosis, and thereupon the agent misrepresented to the insured that the policy had already lapsed upon his taking up a policy loan that had been made to him, and the insurer would receive no more payments of premiums, which in ignorance the insured believed, and did not then resist on account of his physical condition and resulting depression, but afterwards brought suit for reinstating the policy, and he had always been able, ready, and willing to pay the premiums: *Held*, sufficient on the question of actionable fraud to sustain a verdict in favor of the beneficiaries of the policy obtained after the death of the insured.

2. **Insurance, Life—Principal and Agent—Fraud—Ratification.**

Where the insurer retains the rights or benefits of cancellation of a life insurance policy procured by the fraud of its agent, it may not retain the benefits thus received and repudiate it, for such would be a ratification thereof, whether expressly or impliedly authorized by it or not.

APPEAL by defendant from *Allen, J.*, and a jury, at September Term, 1920, of ALAMANCE.

Plaintiff sued on an insurance policy of $3,000, held in defendant company at the time of his death, claiming that the failure to pay the two last premiums thereon was caused by false and fraudulent representations of the defendant's agent having charge of the matter. Defendant denied liability; alleged that policy forfeited for failure to pay premiums due thereon; that if any representations were made by their agent it was after the absolute forfeiture of policies, and agent in question was without authority in the premises. The jury rendered the following verdict:

"1. Was the lapsing of the policy sued on procured by fraud and misrepresentation, as alleged in the complaint? Answer: 'Yes.'

"2. If said representations were made, were the same made prior to 1 January, 1918, that is, before that time? Answer: 'Yes.'"

Judgment for plaintiff for amount of policy, less unpaid premiums. Defendants excepted and appealed.

J. J. Henderson, W. P. Bynum, R. C. Strudwick for plaintiff.
Brooks, Hines & Kelly for defendant.

HOKE, J. There were facts in evidence on the part of plaintiff tending to show that in 1915 plaintiff's intestate had taken out a policy in defendant company for $3,000, at an annual premium of $106.32, payable 1 December of each year, and with an extension privilege of thirty days, the first premium becoming due in 1915. That the policy was pledged to the company as collateral for a loan of money, which had been paid off when due, the company still retaining possession of the policy. That the premiums for 1915 and 1916 were duly paid by intestate, and in 1917, the latter part of November or in December of said year, an agent of defendant company came to the home of the intestate, reminded him that his premium would soon be due, or was already due, and urged the intestate not to allow the policy to lapse. That intestate, in the conversation, told the agent that he had developed a case of tuberculosis and there was doubt if he could keep up the policy, etc. Thereupon the agent immediately changed position and told the intestate that he had pledged the policy to the company as security and that the same had lapsed and become void on payment of said loan, and company would accept no more premiums on it. That the intestate was a farmer, ignorant of business of this kind, and especially of the business of life insurance. That the health of intestate had been failing for some months and was rapidly growing worse, and "his fatal malady was such as to seriously affect his nervous system, rendering him despondent, impairing his capacity for work or resisting importunity"; and under the conditions presented, believing representations of agent to be true, and that the policy was no longer in force, he failed to pay the premiums for 1917-1918. That intestate was at all times ready and willing to pay said premiums, and as soon as he ascertained that he had been imposed upon by the false and fraudulent representation of defendant's agent he instituted suit against the company for reinstatement, etc., but died in the early part of 1919, before the case could be brought to a trial.

There was evidence of defendant in denial of plaintiff's position and tending to show that any conversation with Mr. White, their agent, was in January, 1918, after the policy had become forfeited. That said agent was without power to bind the company by any waiver or stipulation other than contained in the contract. On the pertinent issues submitted, the jury have accepted plaintiff's version of the matter, and on the facts, as stated, we are of opinion that her cause of action has been properly established.

It is chiefly urged for error by appellant that the court, in part and on the principal issue, instructed the jury as follows:

"If the jury should find by the greater weight of the evidence that V. B. White, as agent of the defendant, procured the lapsing of the policy as alleged in the complaint, which I have mentioned to you, by fraud and false representations—I say, if the jury find, by the preponderance of the evidence, that White, as agent of the defendant, procured the lapsing of the policy by fraud and false representations, then the defendant company cannot retain the benefit of such conduct of White and be relieved from the consequence of such fraudulent means by which such lapsing was obtained, if you find that to be the fact."

There are facts in evidence on the part of plaintiff permitting the inference that the agent, V. B. White, was within the course and scope of his authority in his conversation with intestate about keeping up the policy, but assuming, as this instruction does, that the said agent acted beyond his powers in the premises, we think the charge is in accord with the approved principles. In Tiffany on Agency, p. 46, it is said "That the relationship of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act in his behalf, but without authority or in excess of authority, with the same force and effect as if the same had been created by appointment." The citation, as stated, is quoted as authoritative in *Trollinger v. Fleer,* 157 N. C., 81-87, and the principle has been approved and applied in numerous decisions in this and other courts dealing with the question. *Bank v. Justice,* 157 N. C., 373-375; *Osborne v. Durham,* 157 N. C., 263; *Sprunt v. May,* 156 N. C., 388; *Rudasill v. Falls,* 92 N. C., 222; *Reitman v. Florillo,* 76 N. J. L., 815; *Whiting v. Craudell,* 78 Nev., 593; *Clough v. Dawson,* 138 Pac., 233; *Heinlein v. Imp. Life Ins. Co.,* 101 Michigan, 250; *Tabor v. Michigan Mutual Life Ins. Co.,* 44 Mich., 324.

As a deduction from the primary position and more directly applicable to the facts presented, it is held in the *Reitman case, supra,* "That an innocent principal cannot assert any rights or retain any benefits upon a contract when it is procured by the fraud of his agent." And so here. The surrender of the policy having been procured by the false and fraudulent representations of V. B. White, an agent of the company, and professing to have authority in the matter, the company cannot retain the policy and repudiate the acts of the agent by which it was obtained.

There are modifications of the doctrine required, or, rather, a different rule prevails when one is seeking to hold an innocent principal in an action for deceit on the part of his agent, and there are other well recognized exceptions, *Kenneday v. McKay,* 43 N. J. L., 288; 2d Corpus Juris, 495, but we are clearly of opinion that the present case comes well within the wholesome principle laid down by his Honor, and that the judgment for plaintiff should be affirmed.

No error.

L. A. LOGGINS, ADMINISTRATOR, v. SOUTHERN PUBLIC UTILITIES COMPANY ET AL.

(Filed 20 April, 1921.)

1. Street Railways—Carriers of Passengers—Negligence—Status of Passenger.

Whether one who has just alighted from a street car as a passenger ceases to be one immediately upon alighting, so as to cause the company's responsibility to cease, under the ordinary rule of its liability for the safety of its passengers, depends upon the apparent danger of the one so alighting under the conditions of danger and the surrounding circumstances which should have been observed by the company's employees in charge of the car, and the injury caused by their want of due care could reasonably have been prevented by them.

2. Same—Alighting from Car.

Upon the question of the liability of a street car company to one who had just alighted from its car as a passenger, and had been run over and killed at a regular stopping place in a dangerous portion of a city, arising from traffic conditions on the street, the test is not whether the passenger had actually left the car and reached the street without injury, but whether the place was safe for him to have alighted, under the attending circumstances, there being a distinct difference between a safe landing and landing in safety, and the rule being that he retains his status as passenger until he has stepped from the car to a place of safety on the street or highway.

3. Same—Transfer Points.

Where the transportation of a passenger on a street car requires a transfer for him to reach his destination ordinarily, he is to be regarded as a passenger while making the change from the one car to the other as a part of the continuous trip, and to receive from the carrier's employees the same degree of care required for the protection of its passengers from injury.

4. Same—Evidence—Infants—Nonsuit—Questions for Jury—Trials.

In an action to recover damages of a street car company for alleged negligence causing the death of the plaintiff's infant intestate, there was evidence tending to show that the intestate and his father, a carpenter, carrying his tools, became passengers on the defendant's car, requiring transfers to reach their destination, and forgetting their lunch basket, the intestate ran back, entered the car, got the lunch basket, the conductor opened the car door for him to alight, at a place of much traffic upon the street, and, just after alighting, an automobile struck and killed the intestate: *Held*, sufficient of defendant's actionable negligence to take the case to the jury, and that the youth of the intestate, and the impulses or characteristics of boys of his age, in determining the relative rights and duties of the parties, will be also considered in passing upon defendant's motion as of nonsuit.

5. Motions—Nonsuit—Evidence.

Upon a motion as of nonsuit upon the evidence, the court will not pass upon conflicting evidence, and the inquiry will be to its sufficiency to warrant a verdict for the plaintiff, taken in the light most favorable to him.

WALKER and ALLEN, JJ., dissenting.

APPEAL by plaintiff from *Webb, J.*, at February Term, 1921, of FORSYTH.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's intestate, a boy between eight and nine years of age.

There was evidence for the plaintiff tending to show that on 10 July, 1919, L. A. Loggins, a carpenter, and his infant son took passage on a street car of the Southern Public Utilities Company, near 23d Street in the city of Winston-Salem, and paid their fares to East Winston, where plaintiff lived. In order to make this continuous trip over the defendant's lines it was necessary to ride down Liberty Street in said city to a point near its intersection with Fourth Street, and there to transfer to another car bound for East Winston.

Before reaching this regular transfer point the conductor gave the plaintiff and his son transfer tickets which were to be used on the East Winston car as soon as it reached the junction. They left the initial car at the usual stopping place, which is in "the center of the business part of town, where passengers ordinarily transfer from one car to another, and there is a great deal of traffic and congestion about this corner."

The father had his arms and pockets full of carpenter's tools and was carrying some tools on his shoulder. Just as he reached the sidewalk, the boy being several feet from the curbing out in the street, he remarked: "Son, where is our basket?" The basket, containing their lunch, had been left on the car. Almost instantly the boy turned and ran back into the street car to get the basket. He entered at the front door, and the motorman closed the door behind him. After finding the basket, he came back to the front platform. The motorman then opened the door to let the boy out, and just as he stepped off the car to the street an automobile driven by Louisa Holland ran over him and killed him. The boy "turned as he stepped off in the street and his back was to the automobile. He turned and she hit him. People were getting off and on the street car at the back end at the time she passed. The automobile ran over him just as he got off the car and got one step."

At the close of plaintiff's evidence, defendant moved for judgment of nonsuit as to the Southern Public Utilities Company, which motion was allowed. Plaintiff appealed.

J. C. Wallace and Raymond G. Parker for plaintiff.
Manly, Hendren & Womble and Swink, Korner & Hutchins for defendant Southern Public Utilities Company.

STACY, J. Considering the evidence most strongly in favor of the plaintiff, which we are required to do on a motion to nonsuit, we think it sufficient to carry the case to the jury.

The following may be stated as reasonable inferences from the testimony appearing in the record:

1. Plaintiff's intestate, a boy under nine years of age, was a passenger on one of the street cars of the Southern Public Utilities Company.

2. In company with his father, he left this car at the usual place, for the purpose of transferring to another car which would carry them to East Winston.

3. He had in his possession a ticket which entitled him to transfer from one car to another at this point.

4. After leaving the car, but before reaching the sidewalk, and while passengers were still getting on and off, he returned through the front entrance to get his lunch basket, which inadvertently had been left on the car.

5. The defendant's motorman was aware of the boy's movements and opened the door for him to disembark the second time.

6. This happened near a corner in the center of the business part of town where there is a great deal of traffic and congestion.

7. Just as he stepped from the car to the street, and probably had taken one step, he was struck by an automobile and killed.

His Honor granted the defendant company's motion for judgment as of nonsuit upon the theory that plaintiff's intestate was not a passenger at the time of his injury, and that the defendant company owed him no affirmative duty or care.

By the clear weight of authority the relation of passenger and carrier ordinarily ends when the passenger safely steps from a street car to the street. He then becomes a pedestrian on the public highway, and the carrier is not responsible for his safe passage from the street to the sidewalk; for once safely landed in the street, his rights as a passenger cease. *Wood v. Public-Service Corporation*, 174 N. C., 697; *Whilt v. Public-Service Corporation*, 76 N. J. L., 729; *Clark v. Traction Co.*, 138 N. C., 77; *Palmer v. R. R.*, 131 N. C., 250; *Smith v. City Ry. Co.*, 29 Or., 539; *Creamer v. West End St. Ry.*, 156 Mass., 320; *Keaton v. Traction Co.*, 191 Pa. St., 102; *Street R. R. v. Body*, 105 Tenn., 669; *Oddy v. W. Street Ry. Co.*, 178 Mass., 341; *Duchemin v. Boston, etc., Co.*, 104 Am. St. Rep., 580, and note.

However, the courts are not universally in accord on this subject. In *Johnson v. Washington Water Power Co.*, 62 Wash., 619, it is stated: "A passenger on alighting from a street car is more or less subject to the conditions in which the carrier has placed him, and common prudence dictates that he should have a reasonable time to note the surroundings and prepare to protect himself from the ordinary dangers of the street." And in *Louisville Ry. Co. v. Kennedy*, 162 Ky., 560, it is said: "When a street car stops to permit a passenger to alight he is still a passenger until he has had a reasonable opportunity to reach a place of safety." Again: "It is the duty of a street car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose." *Macon Ry. Co. v. Vining,* 120 Ga., 511; and to like effect: *Birmingham Ry., Light and Power Co. v. O'Brien,* 185 Ala., 617; *Welsh v. Spokane, etc., R. R. Co.* 91 Wash., 260; *Montgomery Street Ry. Co. v. Mason,* 133 Ala., 529, and *Melton v. Birmingham Ry., L. and P. Co.,* 153 Ala., 95. See, also, 10 C. J., 627.

Ordinarily a person would not step from a car to the street in the presence of imminent danger, or unless it were safe to do so; and *safely landed in the street* does not mean simply reaching the street with both feet and no more. The test could not be as to whether the passenger had actually left the car and reached the street without injury, but was it safe for him to do so under the attending circumstances? Obviously, there is a difference between a safe landing and a landing in safety. The one has reference to the act of the passenger in stepping from the car to the street, the other to the condition in which he finds himself immediately after accomplishing this act.

We think a fair statement of the rule would be to say that a passenger, on alighting from a street car at the end of his journey, loses his status as a passenger when he has stepped from the car to a place of safety on the street or on the highway. The question should not be made to depend entirely upon the number of steps which the passenger may take on leaving the car, but rather upon the circumstances and conditions under which he alights. He is entitled to be discharged in a proper manner and at a time and place reasonably safe for that purpose.

It is also held that the relation of passenger and carrier continues while the passenger is transferring from one street car to another, he having been furnished a ticket enabling him to do so, when such transfer is part of a continuous trip, or, at least, that he is entitled to the same degree of care as a passenger to insure his safety from injury by the operation of the same or other cars of the carrier, or from defects or negligence in the use of any of its appliances. *Wilson v. Detroit United Ry.,* 167 Mich., 107; *Citizens Street Ry. Co. v. Merl,* 134 Ind., 609; *Keator v. Traction Co.,* 191 Pa. St., 102; *Baldwin v. R. R. Co.,* 68 Conn., 567; *Walger v. Ry. Co.,* 71 N. J. L., 356.

In *Clark v. Traction Co.,* 138 N. C., 77, it is said: "A person in transferring from one street car to the other is still a passenger, the transfer being but a part of the trip, for the whole of which the company agrees to convey in safety."

In *Walger v. Jersey City Ry. Co., supra,* the plaintiff was a passenger on one of the defendant company's cars. He disembarked from this car for the purpose of transferring to another, a ticket enabling him to do so having been furnished him on the car upon which he first took passage. The place at which he alighted was the regular transfer point. After getting off the car, and as he was about to cross over to the other car, or while he was doing so, the car which he had left started to go around what is described in the case as "the loop," and its rear end struck him, knocked him down and injured him. Plaintiff testified that the accident happened immediately after he got off the car and before he had taken a single step away from it. The Court held that he was still a passenger at the time he was struck, and entitled to be regarded as such.

In *Baltimore and Ohio R. R. Co. v. State,* use *Houser, et al.*, 60 Md., 449, the deceased was a passenger "with a ticket that entitled him to be carried safely from Hagerstown to Frederick. By the regular route and mode of carriage, it was necessary for him to change cars at the Weverton station and to cross over the intervening tracks of the defendant from one train to another. In making this transit he continued to be a passenger of the defendant, and entitled to the protection that the highest degree of care on the part of the defendant could afford under the circumstances."

It may be that this rule has been stated too broadly in some of the cases, but it would be well-nigh impossible to couch a satisfactory limitation in general terms, for as to whether a person, under a given state of facts, would be considered in law a passenger while transferring from one street car to another, although holding a transfer ticket, must be determined ultimately by the facts and circumstances attending the transfer in each particular case.

There is another line of cases in which a passenger does not lose his rights as such, under conditions somewhat different from those above stated.

In *Tompkins v. Boston Elevated Ry. Co.*, 201 Mass., 114, it was held that a passenger who, on account of the crowded condition, was riding on the vestibule or platform of the car, did not cease to be a passenger by temporarily alighting for the purpose of permitting other passengers to get off the car more conveniently. The Court saying: "The necessity or courtesy which prompted his action did not terminate his status as a passenger."

In *Chicago and Eastern R. R. Co. v. Flexman*, 103 Ill., 546, it was held that where a passenger on a railroad, on arriving at his destination, missed his watch and, with the consent of the conductor, remained on the train for the purpose of looking for it until he reached another station, the company occupied the same position towards the passenger as if he had paid his fare to such other station.

In *Ormond v. Hayes*, 60 Tex., 180, it was held that where a passenger, upon alighting from a train, went to the baggage car for the purpose of obtaining his baggage, and there aided the servants of the carrier in removing the baggage from the car, the relation of passenger and carrier did not cease by that act, he not holding a check for his baggage at the time.

In the case at bar, under all the facts and circumstances appearing on the record, we are of the opinion that plaintiff's intestate, while alighting from the car after getting his lunch basket, was entitled to be regarded as a passenger on defendant's car and still within the sphere of its protection as such. *Palmer v. R. R., supra.* We think he was within his rights as a passenger in immediately returning for his basket. This was done with the knowledge and consent, or at least acquiescence, of defendant's motorman. He was permitted to take the basket into the car without objection; and, under the same conditions, he returned to get it. Had he not been a passenger his basket would not have been on the car at all; neither would he. What really transpired was only an incident occasioned by his mode of traveling. It was not unusual or uncommon, and doubtless not altogether unexpected. The agility with which he ran back into the car, after his attention had been called to the missing article, was characteristic of boyish impulses; and his youthfulness should be taken into consideration in determining the relative rights and duties of the parties.

The defendant elicited on cross-examination some evidence not as favorable to the plaintiff as that stated above, but we are not permitted to pass upon conflicting testimony when considering a judgment of nonsuit. Our inquiry is directed to its sufficiency to warrant a verdict in favor of the plaintiff. The jury alone may consider its credibility. *Shell v. Roseman,* 155 N. C., 90.

With the case going back for a new trial, we refrain from further comment or discussion, as the defendant's evidence may show a different state of facts from what now appears.

Reversed.

WALKER and ALLEN, JJ., dissenting.

FANNIE WOOD v. K. K. WOOD.

(Filed 20 April, 1921.)

1. Actions—Suits—Divorce—Venue—Statutes.

The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by Rev., 1559, under the title of "Venue," providing that the summons be returnable to the county wherein the applicant resides, and by amendment, chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendant resides.

2. Same—Demurrer.

A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his residence, is bad.

Appeal by defendant from *Ray, J.*, at November Term, 1920, of Davidson.

This is an action for divorce *a mensa et thoro* because of cruel treatment, which rendered *feme* plaintiff's condition intolerable and her life burdensome.

It is not necessary to set forth in detail the specific allegations of cruelty. The case is here upon a motion to remove the same for trial to the county of Davie, where plaintiff's husband resides and has his domicile.

The motion was denied. Defendant thereupon appealed.

Walser & Walser for plaintiff.

J. R. McCrary, A. T. Grant, Jr., and E. L. Gaither for defendant.

Walker, J. The defendant contends that the domicile of the wife is that of her husband, and therefore the action should have been brought in Davie County, and relied mainly upon *Smith v. Morehead*, 59 N. C., 360, where the husband resided in one county of this State and the action was brought by the wife in another county. The court dismissed the bill for want of jurisdiction because, according to the common law, the residence of the wife was that of her husband, and therefore the venue had been improperly laid.

Conceding that to be the rule of the common law, it does not apply to this case, as the law has been changed by statute. In the Revisal of 1905, sec. 1559, it is provided, under the title of "Venue," that "In all proceedings for divorce the summons shall be returnable to the court of the county in which the applicant resides," and by Public Laws 1915, ch. 229, that section was amended by striking out the final words, "the applicant resides," and inserting in place thereof the words "either the plaintiff or defendant resides," so that it now reads: "In all proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides." Either one of these sections, the original one or that which was changed by amendment, is sufficient, in our judgment, to show clearly the intention of the Legislature to change the rule of the common law as laid down in *Smith* *v. Morehead, supra.* If this is not so, why change the statute at all, or why not simply have provided that the action should be brought in the county where the husband resided or had his domicile? The section, before amendment, required the action to be brought in the county "where the applicant resided." This obviously implied that each of the possible applicants might have a different residence from the other, but this would not be so, if the ancient common-law rule still prevailed, because there was but one domicile, which was that of the husband. And the amended section is, if anything, much more significant of an intention to change the law and accord to the wife, if plaintiff in the action, the right to sue in the county of *her* residence, as distinguished from that of her husband, for the section, as it now reads, provides that the venue in an action for divorce may be laid in the county where the plaintiff or the defendant resides, thereby plainly recognizing that the parties to the suit may have different residences, for the purpose of determining the venue or place of trial. We cannot admit, for a moment, that the Legislature would do so vain and useless a thing as to enact and then change the statute without intending to alter the former rule of law as stated in *Smith v. Morehead, supra.*

The defendant contends, though, that there are several cases decided since the act of 1871-2, ch. 193 (Rev., 1559), was enacted which have cited *Smith v. Morehead, supra,* with approval, and the inference is drawn therefrom that it has been affirmed on this point, as will appear in the report of those cases, which are the following: *Hicks v. Skinner,* 71 N. C., 539; *S. v. Ross,* 76 N. C., 242; *Moore v. Moore,* 130 N. C., 335; *Cook v. Cook,* 159 N. C., 47. We have carefully examined all of those decisions and none of them applies to this case. *Hicks v. Skinner* was an action to determine the equities of the wife in a trust fund held by Mr. B. F. Moore; the plaintiffs, who were her husband's creditors, alleging that all her rights had passed to her husband because of the unity of husband and wife. *S. v. Ross, supra,* was an indictment for fornication and adultery, and involved the validity in this State of a marriage between a white person and a negro, contracted and solemnized in another where such marriages were lawful and valid. In *Moore v. Moore, supra,* the plaintiff, who was the wife, had gone to another State for a temporary purpose, and at her husband's request, with the intention of returning to this State, and afterwards she did return to this State, and after being disowned by her husband, she resided here separately from him for more than the required two years. The court sustained her action against a motion to dismiss it. That case would, in principle and legal effect, seem to be against the defendant. The question in *Cook v. Cook, supra,* was not one of venue, but related to the pendency of another action. It is, however, to be noted that the defendant in that case, who was the husband, did not ask for a change of venue from Wake County, where his wife had sued him for divorce *a mensa,* to Alamance County, where he had sued his wife for divorce *a vinculo,* but virtually admitted her right to sue in Wake County, although her husband resided in Alamance County. The only question presented and decided in that case was as to the plea of the pendency in Alamance County of his suit for divorce *a vinculo.* So, while the court did not discuss or decide the question herein presented, it was tacitly conceded that the suit had been brought in the proper county. In none of those cases was any reference made, even remotely, to the change in the law as to venue, which was wrought by Rev., 1559, because, we suppose, there was no need to do so, as the question we have here was not raised in any of them. The nearest to it is what was said in the *Moore case,* and that impliedly holds that the wife can have a separate domicile for the purpose of venue, for the plaintiff there did live in this State, and away from her husband, for two years or more before her suit was commenced.

Some of the courts in other jurisdictions hold that where the wife is compelled by her husband's conduct to separate herself from him and dwell in a home of her own, she may bring her action for divorce in the county of her own actual domicile, but we are not required to decide as to the correctness of this view, and express no opinion upon it.

The result is that there was no error in refusing to remove the case.

Affirmed.

TIRE AND RUBBER COMPANY v. MOTOR COMPANY.

(Filed 20 April, 1921.)

Verdict—Issues—Answers—Judgment.

When the jury fail to answer issues as to the defendant's counterclaim, pleaded and with evidence to support it, and only find the issue as to plaintiff's demand in the affirmative, it is insufficient to support a judgment in plaintiff's favor, as impliedly answering the other issue against the defendant's claim.

APPEAL by defendant from *Ray, J.,* at November Term, 1920, of GUILFORD.

Civil action to recover the sum of $414.50, balance alleged to be due on contract for certain automobile tires sold and delivered the defendant under a written jobber's agreement. Defendant admitted execution of the contract and the nonpayment of a balance of $226.38 for tires duly received; but set up in defense and by way of counterclaim that the plaintiff had breached the contract and had failed and refused to make shipments as specified in the agreement, by reason of which, defendant alleged and offered evidence tending to show that it had been damaged in the sum of $1,800.

Upon issues joined, the following verdict was rendered by the jury:

"1. Is defendant indebted to plaintiff; and, if so, in what amount? Answer: 'Yes, $414.50.'

"2. Did plaintiff breach its contract with defendant? Answer: ....

"3. What damages, if any, is defendant entitled to recover of plaintiff? Answer: ...."

Defendant in apt time lodged a motion to set aside the verdict because the second and third issues, relating to its counterclaim, had not been answered. This motion was overruled, and his Honor rendered judgment in favor of the plaintiff for $414.50. Defendant appealed.

Justice & Broadhurst and O. C. Cox for plaintiff.
Brooks, Hines & Kelly for defendant.

STACY, J. There was ample evidence tending to support the defendant's counterclaim, and we think the issues raised thereby must be answered before any final judgment can be entered in the cause. We are not at liberty to say that the jury intended to answer the issues against the defendant, because they did not answer them at all; nor do we think the answer to the first issue a necessary denial, by implication, of defendant's counterclaim. It is true, the jury evidently accepted plaintiff's contention as to the correct balance due for the tires sold and delivered to the defendant; but upon the question as to whether there was any breach of the contract, as alleged, and a refusal to ship other tires, which resulted in loss to the defendant, the verdict is silent.

In the case of *McKenzie v. McKenzie*, 153 N. C., 242, the following expression was used in speaking of a similar point raised on that appeal: "The material issues of fact raised by the pleadings should be submitted to the jury, and, of course, answered by them. *Davidson v. Gifford*, 100 N. C., 18. And the issues, with the responses thereto, must be sufficient to support the judgment and dispose of the matters in controversy." *Falkner v. Pilcher*, 137 N. C., 449. As suggested in *Wilson v. R. R.*, 165 N. C., 499, we think his Honor should have sent the jury back with directions to answer the remaining issues before receiving the verdict.

Had there been no evidence to support the counterclaim it might have been disregarded, but in the present state of the record the defendant's motion to set aside the partial verdict, as rendered, should have been allowed.

New trial.

P. H. DURHAM v. T. Y. HAMILTON ET AL.

(Filed 20 April, 1921.)

1. Judgments—Scope of Inquiry.

An adversary judgment is only the conclusion of law from the facts admitted or established by the verdict, and must be within the scope and purport of the facts so ascertained and determined; and a judgment that goes further is irregular at least, and may at times be held entirely invalid.

2. Same—Nuisance—Appeal and Error.

Where entered in the scope of the inquiry and upon properly established facts, a judgment for damages and an order restraining the defendant from maintaining a slaughter-house and connecting hog and cattle pen, as a nuisance affecting plaintiff's property, is a proper one; but where the judgment goes further and uses the additional words, "or otherwise," such words may be construed and operate to prevent the defendant from using his property in a manner entirely proper and harmless to plaintiff, and will be ordered stricken out on appeal.

APPEAL by defendants from *Ray, J.*, at October Term, 1920, of GUILFORD.

The action is to recover damages for an alleged nuisance affecting the property of plaintiff, and to restrain the further continuance of same, caused by the wrongful and improper maintenance by defendants of a slaughter-house on a stream just above plaintiff's land, and aggravated by the condition of certain hog-pens, etc., as maintained in connection with said slaughter-house, and causing damage, etc. On denial of liability, the jury rendered the following verdict:

"1. Did the defendants erect and maintain the nuisance as alleged in the complaint? Answer: 'Yes.'

"2. What damages, if any, is the plaintiff entitled to recover? Answer: '$600.'"

Judgment for amount of damages and that defendants be restrained, etc. Defendants except and appeal.

R. C. Strudwick, Wilson & Frazier, J. M. Hedgecock for plaintiff.

T. W. Albertson, King, Sapp & King, Brooks, Hines & Kelly for defendant.

HOKE, J. We find no error in the record affecting the determination of the issues, but the judgment in our opinion goes farther than the verdict warrants. As applied to the facts of this record, an adversary judgment is but the conclusion of the law from the facts admitted, or as established by the verdict, and must be within the scope and purport of the facts so ascertained and determined. Beyond that, the judgment is at best irregular and may at times be held entirely invalid. *Holloway v. Durham,* 176 N. C., 550; *Hobgood v. Hobgood,* 169 N. C., 491; *Williams v. Alexander, etc.,* 74 N. C., 1; *Whitwell v. Hoover & Emory,* 3 Mich., 84; *S. v. Muench,* 217 Mo., 124; 15 R. C. L., 569, title, Judgments, sec. 2.

In *Holloway v. Durham, supra,* it is held "That an adversary judgment of the court upon matters beyond the scope of the pleadings and which undertakes to settle and determine those entirely foreign to the controversy is to that extent not binding, etc."

In *S. v. Muench, supra,* a judgment is defined as the "Sentence of the law upon the record; an application of the law to the facts and pleadings." A very proper and succinct definition is given in *Whitwell v. Hoover & Emory, supra,* "That a judgment is the final consideration and determination of a court of competent jurisdiction upon the facts submitted to it." And again, in the citation to R. C. Law, it is said: "A more precise definition is that a judgment is the conclusion of the law upon the matters contained in the record or the application of the law to the pleadings and the facts as found by the court or admitted by the parties, or deemed to exist upon their default in a course of judicial proceedings."

On the present record, after awarding a recovery for the damages suffered, and that the further maintenance of the nuisance be restrained, the judgment proceeds as follows: "And defendants are further ordered and directed not to use or maintain or permit the use and maintenance on said premises of any hog-pen or cattle pen for use in connection with said slaughter-house or otherwise." The condition and manner of conducting the hog-pens and cattle pens "in connection with the slaughter-house" were very clearly shown to be a part of the nuisance and in great aggravation to the injury, and were properly prohibited, but in extending this prohibition by the term "or otherwise" this might very well be construed and operate to prevent the defendants from using their property in the respects suggested as required by the course of good husbandry and in a way entirely harmless to plaintiff. To that extent we think the judgment is unauthorized by the facts established, and same should be modified by striking out the words "or otherwise." With this modification the judgment is

Modified and affirmed.

VANCE BRADY v. J. R. HUGHES, SHERIFF.

(Filed 20 April, 1921.)

1. **Sheriffs—Personal Execution—Penal Statutes—Strict Construction.**

   The provisions of C. S., 3943, making the sheriff liable for the escape of one taken under personal execution upon a judgment for the payment of a debt, interest, and cost, are highly penal, requiring a strict construction or, at least, one reasonable in determining the sheriff's liability in any given case.

2. **Same—Escape—Absence of Deputy Sheriff.**

   The fact that the sheriff's deputy permitted his prisoner to remain in an attorney's office, with door unlocked, while he, the deputy, was away for a few minutes, and that he returned, found the prisoner there, and delivered him to the jailer, as the statute, C. S., 3943, required, is not such an "escape" as will make the sheriff liable for the debt, etc.

3. **Same—No Damage Shown.**

   The fact that the sheriff's deputy permitted his prisoner, arrested for debt under an execution against the person, to remain a few minutes in a room with the prisoner's attorney, from which the deputy sheriff was absent for a part of the time attending to matters connected with the case, and then, soon returning, delivered the prisoner to the jailer as the statute directs, C. S., 3943, where the prisoner remained until discharged in due course of the law, does not show any loss to the plaintiff, and is not such an "escape" as is contemplated by the statute.

APPEAL by plaintiff from *Ray, J.*, at November Term, 1920, of GUILFORD.

Plaintiff's cause of action, briefly stated, is that defendant, Sheriff of Randolph County, through one of his deputies, arrested one Robert Needham, under an execution against the person regularly issued from the Superior Court of Guilford County to Randolph County, in an action entitled "Vance Brady v. Robert Needham"; that after making the arrest the sheriff, by his deputy, brought the defendant in execution to Greensboro, and upon his arrival took him to the office of his (Needham's) counsel, where he (the deputy) left him for a few minutes in charge of his said counsel so that he could attend to another matter connected with the case. The deputy sheriff returned to the office, where his prisoner remained during his absence, and took him to the jail and delivered him to the sheriff of Guilford County, according to the mandate of the writ, who confined him in prison until he was duly discharged by law.

Defendant demurred. The court sustained the demurrer, and plaintiff appealed.

W. P. Bynum, R. C. Strudwick for plaintiff.
Brooks, Hines & Kelly for defendant.

WALKER, J. It appears, in this case, that the prisoner was not permitted, voluntarily or negligently, to go at large, nor in fact did he go at large. He had the opportunity, perhaps, to do so, but the mere chance to do so will not constitute an escape within the meaning of our statute (Rev., 2823; C. S., 3943), making the sheriff liable for the debt, interest, and costs. The statute is highly penal, which would require it to receive a strict construction or, at least, the construction of it should be a reasonable one in determining liability in any given case.

There was no actual escape by the defendant. He did nothing himself, but at all times continued obedient to the direction and control of the deputy sheriff, who had him in custody. An escape is said by this Court to take place "When one under arrest gains his liberty before he is delivered in due course of law or the departure of a prisoner from custody." *S. v. Ritchie,* 107 N. C., 857, opinion by the present Chief Justice. These definitions, as there said, were approved by *Chief Justice Smith* in *S. v. Johnson,* 94 N. C., 924. If we test the question now being considered by either one of these definitions, there was in law no escape by the defendant, and none imputable to the officer in whose custody he was at the time. The defendant was not left in charge of the attorneys in their office at his own request, nor was any favor or liberty intended to be granted to him, but what was done by the officer was something incident to the execution of the process and in the line of his duty. The defendant remained in custody, and under restraint, and it may be fairly inferred from the admitted facts that the restraint was really more effectual than it was when he was in the actual custody of the officer. The latter was absent only a few moments, and the defendant, during this very brief interval, acknowledged the control and authority of the deputy sheriff, and never once attempted to evade it or even to question it, if he ever, for a single moment, contemplated flight. Everything was fully accomplished as the law intended, and with the full consent and submission of the defendant to the law. He was taken to the jail of Guilford County, according to the mandate of the writ, and there delivered into the custody of the sheriff, who imprisoned him until he was discharged in due course of law. How has plaintiff lost a penny, or how was he in jeopardy of losing one? The execution and statute required the officer "to arrest the debtor, and commit him to the jail of the (proper) county until he shall pay the judgment or be discharged according to law." This has been done in exact conformity to the statute, and without the least prejudice to the rights of the plaintiff. We cannot believe that the law is so rigorous as to require that we should adopt the view taken of the case by the plaintiff.

But we find high authority for the support of our position in *Currie v. Worthy,* 47 N. C., 104. That was a case where a defendant was confined in "the debtor's room" of the jail, and was left by the jailer with the doors of the room and jail open, so that nothing prevented his escape. The court made several comments upon the evidence, which we will not quote literally, but reproduce substantially and without regard to the text, as some reference to them is necessary to a full and proper understanding of the decision. The Court said that the impression of two or three witnesses that they saw Currie step from his room into the jailer's room and then back into his own room is not a fact that can be dealt with by a court; it is to be taken, therefore, that his Honor was of the opinion that if a debtor is allowed to see company in the debtor's room, the door being open and the jailer not present, or to be in the room alone with the door closed but not locked, or to have the door of the room left open, so that nothing prevented the debtor's escape if he desired to leave the jail, is, in law, an escape, although the debtor does not in fact leave or go out of the debtor's room. *Chief Justice Pearson* then refers to the Statute of 13 Edw. 1, ch. 1, it being like our act (Revisal of 1905, sec. 2823; C. S., sec. 3943), and says the act of 1795 requires that the jails of the several counties shall have an apartment for the confinement of debtors. A debtor who is not allowed to go out of this apartment, and to take the benefit of prison bounds, is said to be a "close prisoner." The statute, 13 Edw. 1, ch. 1, Revised Statute, ch. 109, sec. 20, gives the creditor an action of debt against a sheriff who shall willfully and negligently suffer a debtor to escape. Our question is, what amounts to an escape in the meaning of this statute? The acceptation of the term is, "to get away from, to go out of, a place of confinement"; and in the declaration under this statute the allegation is, "and the said defendant, on, etc., at, etc., suffered and permitted the said E. F. to escape and go at large; and the said E. F. did then and there escape and go at large, wheresoever he would, out of the custody of the said defendant." See form, 2 vol., Chitty on Plead., 418; another form, 420, and another, 422. See a like form, *Jones v. Pope,* 1 Saunders' Reports, 35. In this connection he says that the attention of the Court was called to *Wilkes v. Slaughter,* 10 N. C., 211, as the authority upon which the erroneous ruling of the Superior Court in *Currie v. Worthy* was based. He criticizes that case and virtually overrules it, and adopts the view of the dissenting Judge. In doing so he says: "The Court lays peculiar stress upon the fact that the jailer had given the debtor the key to his room, so as to make the debtor his own keeper. Possibly this might furnish some ground for distinguishing that from the case now under consideration. The distinction is not substantial enough to be made the ground of a practical difference. For this reason we prefer to put our decision on the ground that we do not concur with the two judges who decided that case, and do not admit the correctness of the doctrine of 'constructive escapes' as at all applicable to the statute under which the present action is brought. Besides, the fact that the authority of that case is weakened by the dissenting opinion of the Chief Justice, the decision is inconsistent with every precedent of a declaration under the Statute of Edw., 1st, to be met with the books. They all contain an express allegation that the 'debtor did escape and go at large.' (See precedents cited above.) In all the precedents of pleas of 'fresh pursuit and recaption,' it is assumed that the debtor had gone out of the jail. We are told by *Lord Coke,* 'one of the best arguments or proofs, in law, is drawn from the right entries in course of pleading; for the law itself speaketh by good pleading'; therefore, *Littleton* here sayeth, 'it is proved by pleading,' etc., as if pleading were *ipsius legis viva vox.* Coke Lit., 115b. We think it is proved by pleading that no constructive escape can make a sheriff liable to the penalty imposed by the act of Edw. 1st. Upon an examination of the cases relied on by the Court in that case, we find there is not any one case cited in which the debtor had not in fact 'left the jail and gone at large'; and we are satisfied that the two very learned judges were misled by the 'cunning and curious learning' which they met with in Plowden, applicable to the state of the ancient law." The Court then considers the question more nearly analogous to the one upon which this case must turn, and says: "How it can be said that a debtor 'did escape and go at large' when, in point of fact, he never went out of the room in which it was the duty of the sheriff to keep him, is beyond the reach of our comprehension. We know of no rule in the construction of a statute which subjects the sheriff to the payment 'of all such sums of money as are mentioned in the said execution and damages for detaining the same' as a penalty for suffering a debtor to escape, by which we are at liberty to hold that an opportunity to go out of the debtor's room is the same, in legal effect, as if the debtor had, in fact, gone out of the room."

It will be seen that the Court, in that case, emphasized the fact that the prisoner was not permitted "to go at large," either willfully, voluntarily, or negligently, nor given perfect freedom of action, and that he did not actually escape, though given full and free opportunity to do so. The former statute required that the debtor should be kept in the prison, *and in close confinement,* while the present statute has no such provision, but requires only that he be committed to the jail of the county until he shall pay the judgment or be lawfully discharged. Rev., 627. Under the former statute requiring "close confinement," this Court held that leaving the debtor in his room, with the doors of the prison open to him during the absence of the jailer, was not an escape on the part of the latter. In this case the debtor was under surveillance and restraint all the time until he was delivered to the Sheriff of Guilford County, and was not at any time permitted "to go at large," nor did he attempt to do so. We cannot, therefore, believe that a case such as this one was within the intention of the Legislature, or within the meaning of the statute.

If we should concede that the facts show a negligent escape, the debtor was immediately retaken and imprisoned, as plaintiff's counsel admitted could be done, when the escape was merely negligent, and that it could be pleaded in bar of a suit for the penalty. It surely cannot be characterized as a voluntary or willful escape. No one can complain of a second arrest or recapture but the party himself. *Ames v. Webber,* 8 Wendell, 545.

It is best always for sheriffs and other such officers to follow strictly the mandates of their writs, but here, if there was any departure, it was formal and not substantial, and not the least prejudice to the plaintiff resulted from it, but he got everything to which the law entitled him. It would be a reproach to the law if, upon so slight a ground, if any ground at all, we should hold the defendant to the payment of so heavy a penalty.

Even the most technical refinement would fail to bring the case within the language of our statute.

No error.

C. E. LEMMONS v. F. E. SIGMAN.

(Filed 20 April, 1921.)

Register of Deeds, Marriage License—Statutes—Penalty—Evidence—Nonsuit—Questions for Jury.

In an action to recover of the register of deeds of a county the penalties allowed by C. S., 2500, 2503, for issuing a license for the marriage of a female under eighteen years of age, and the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered.

APPEAL by plaintiff from *Ray, J.,* at November Term, 1920, of DAVIDSON.

Civil action to recover of defendant, Register of Deeds of Davidson County, the penalty of two hundred dollars allowed by sections 2500 and 2503, Consolidated Statutes, for issuing a marriage license to one John W. Galloway and plaintiff's daughter, Alma Lemmons, without the consent of her parents and without reasonable inquiry as to her age, she being at the time under the age of eighteen.

Upon the question of reasonable inquiry, the only point of difference in the case, there was evidence on behalf of plaintiff tending to show that his daughter lived with him in Winston-Salem at the home of one R. F. Bryant; that she was only fifteen years old, having reached this age on her last birthday, 31 March, 1920, and that plaintiff, at the time, did not know of or consent to his daughter's marriage. R. F. Bryant testified: "I know Alma Lemmons. She was living with her father, C. E. Lemmons, at my house. She was only a child. I would call her about fifteen years old."

The defendant, F. E. Sigman, testified that on 23 April, 1920, John Galloway made application to him, as Register of Deeds of Davidson County, for license to marry Alma E. Lemmons. And further: "I did not know John Galloway. At the time of the application there were present Ernest Lemmons and Alma Lemmons, and I took the statement from all three of them as to the age of the parties to be married, and they stated that Alma Lemmons was eighteen years old. I did not know Ernest Lemmons. I observed the young lady and she looked like she might be a young girl of 18 or 19 years old from her general appearance and dress. She looked like she weighed 125 pounds, had on a long dress and hat turned down over her face, and her face gave the impression of one 18 or 19 years of age. John Galloway was a man clean shaven, about 25 years old, and weighed 135 or 140 pounds. Had dark hair and dark skin and had the appearance of being about 20 or 21 years old. They said they were from Winston. I had Ernest Lemmons, Alma Lemmons, and John Galloway each of them to sign statement and swear to it as it appears on the license. Before issuing the license I made inquiry as to the reliability of the parties applying for the license. I went into the sheriff's office and saw Dr. M. A. Bowers and told him there was a party from Winston-Salem wanting to secure a marriage license; that the contracting parties were Alma Lemmons and John Galloway, and I asked Dr. Bowers if he knew them. He said he did not know Alma Lemmons, but did know John Galloway. I asked him if he was a fellow of reliability, and he said he was a good reliable fellow and a carpenter at Winston and said, 'I know him, I am his physician.' I have known Dr. Bowers ten years. I knew him at Thomasville where I lived and where he was a practicing physician. Knew his general character was good. Dr. Bowers has lived in Winston more than a year and he witnessed the license and the affidavit. And the parties applying were at the time in my office."

Cross-Examination: "I made no effort to call up the parties at Winston, either C. E. Lemmons or Virginia Lemmons. The girl said there was no phone at their home. I relied upon the statement of Dr. Bowers as to the reliability of John Galloway. Dr. Bowers told me John Galloway was a reliable party. I knew Dr. Bowers was a man of high character and a good physician and whatever he said to me I could rely upon. I did not ask Dr. Bowers how long he had known Galloway or what chances he had to know his character. All I wanted to know was if he knew him and if he was a reliable man."

Dr. M. A. Bowers made an affidavit which, by consent, was used as a deposition. He stated, in part, as follows: "I told him (register of deeds) that I did not know Alma Lemmons but that I did know John Galloway, and told him that he was a carpenter. I also told him that in my opinion any statement that Galloway would make could be relied upon, as I had no reason to think otherwise from my personal knowledge and information I had of him. Then, after the license was written out and sworn to by the contracting parties, I witnessed their signatures and their marriage in the register of deeds' office by John Moyer, J. P."

At the conclusion of all the evidence defendant renewed his motion for judgment as of nonsuit. Motion allowed, and plaintiff appealed.

T. W. Kallam for plaintiff.
J. R. McCrary and Raper & Raper for defendant.

STACY, J. The testimony as to the appearance of the girl, with respect to her age, is conflicting; and, upon the question of reasonable inquiry, the facts are not admitted. Hence, considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the case should have been submitted to the jury under proper instructions. *Snipes v. Wood,* 179 N. C., 349; *Julian v. Daniels,* 175 N. C., 549; *Gray v. Lentz,* 173 N. C., 346.

As said in *Furr v. Johnson,* 140 N. C., 157: "Where there is a conflict of evidence, whether there has been reasonable inquiry is to be submitted to the jury upon all the evidence under proper instructions; but if the facts are agreed, it is a matter of law," citing *Joyner v. Roberts,* 114 N. C., 389. The jury alone may pass upon the weight of the evidence or the credibility of the witnesses.

The judgment of nonsuit will be set aside and the case referred to another jury.

Reversed.

SINGER SEWING MACHINE COMPANY v. I. P. BURGER ET AL.

(Filed 20 April, 1921.)

1. **Courts — Jurisdiction — Statutes — Superior Courts—Justices of the Peace.**

The Superior and justices' courts are of concurrent jurisdiction in actions to recover personal property to the value of fifty dollars, and the former has exclusive jurisdiction when the property in controversy exceeds that sum. C. S., 1474.

2. **Same—Mortgages—Equity.**

Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the Superior Court has jurisdiction, when the amount secured is for a less sum than two hundred dollars.

3. **Courts—Jurisdiction—Constitutional Law—Superior Courts—Justices of the Peace.**

While under the provisions of the Constitution of 1868, Art. IV, sec. 33, the courts of the justice of the peace were given "exclusive original" jurisdiction in matters founded on contract when the amount involved did not exceed two hundred dollars, etc., the Convention of 1875 removed the restriction of legislative powers as to the jurisdiction of the Superior Court by eliminating the words "exclusive original" relating to the powers of justices courts.

4. **Courts — Jurisdiction — Justices of the Peace — Superior Courts—Statutes.**

Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by C. S., 1473, to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment.

5. **Same—Counterclaim.**

Where an action on contract has originally and properly been brought in the Superior Court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the Superior Court, will not be denied for want of jurisdiction, on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of C. S., secs. 519, 521, and 602.

6. **Courts—Superior Courts—Jurisdiction—Inferior Courts.**

The jurisdiction of the Superior Court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts.

7. Courts — Justices of the Peace — Jurisdiction—Contracts—Counterclaims.

Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment, as a bar to the plaintiff's demand.

8. Courts—Justices of the Peace—Jurisdiction—Equity—Defenses.

A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense.

9. Actions—Pleadings—Equity—Multiplicity of Suits—End of Litigation.

The intent and purpose of our code system of pleading is to enable parties to determine and settle their controversies in one action, the law favoring the ending of litigation and avoiding multiplicity of suits.

10. Courts — Jurisdiction — Constitution—Statutes—Rule of Property—Procedure.

The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the Superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure.

APPEAL by plaintiff from *Bryson, J.*, at June Term, 1920, of CHEROKEE.

Civil action commenced in the Superior Court to recover a horse, plaintiff claiming under what is in substance a mortgage, executed by the defendant to secure the purchase price, on which there was a balance due of $37.

The defendant denied the right to recover, pleaded payment, and alleged that the plaintiff was indebted to him in the sum of $193 due by contract for feed of another horse, and commissions for services while acting as plaintiff's agent.

The plaintiff demurred to the allegations of indebtedness in the answer upon the ground that the Superior Court had no jurisdiction thereof, the sum demanded being less than $200, which was overruled, and the plaintiff excepted.

The plaintiff also filed a reply denying indebtedness to the defendant, and pleading the three-year statute of limitations.

The jury returned the following verdict:

"1. Is the defendant, I. P. Burger, indebted to the plaintiff, as alleged in the complaint; and if so, in what amount? 'Yes; $37.'

"2. Is the plaintiff indebted to the defendant, I. P. Burger, as alleged in the answer and counterclaim for commissions; and if so, in what amount? 'Yes; $63.'

"3. Is the plaintiff indebted to I. P. Burger for feed and keep of horse, as alleged in the answer and counterclaim; and if so, in what amount? 'Yes; $45.' "

His Honor then rendered judgment in favor of the defendant for $71, and the plaintiff excepted and appealed.

Dillard & Hill for plaintiff.
No counsel for defendant.

STACY, J. In actions to recover personal property the jurisdiction of the Superior Court is concurrent with that of a justice of the peace when the value of the property does not exceed $50 (C. S., 1474), and exclusive when the property in controversy is worth more than that sum. *Houser v. Bonsal,* 149 N. C., 51; *Noville v. Dew,* 94 N. C., 44.

The Superior Court also has jurisdiction of actions to foreclose a mortgage, although the debt secured is less than $200, because "the action is not founded on the contract merely, but on an equity growing out of the relation of mortgagor and mortgagee to have the mortgaged premises, in case of default, sold for the satisfaction of the secured debt." *Murphy v. McNeill,* 82 N. C., 224.

It follows, therefore, that the court had jurisdiction of the cause of action alleged in the complaint, whether treated as one to recover personal property or to foreclose a mortgage.

The amount of plaintiff's claim was found to be correct ($37), while defendant was awarded a verdict on his counterclaim of $108. The court entered judgment for the difference of $71 in favor of the defendant. Plaintiff appeals, assigning as error his Honor's refusal to sustain a demurrer to the counterclaim, on the ground that the sum demanded, being less than two hundred dollars, was not within the jurisdiction of the Superior Court.

It is not denied that the plaintiff's cause of action is cognizable in the Superior Court and that the defendant is entitled to judgment on his counterclaim, provided the court has authority to grant such relief. It is further conceded that the defendant may use his counterclaim as a bar or defense to plaintiff's suit. But is he entitled to an affirmative judgment for the excess over and above the plaintiff's claim? This is the question for decision.

The Constitution of 1868 (Art. IV, sec. 33) provided that "The several justices of the peace shall have exclusive original jurisdiction, under such regulations as the General Assembly shall prescribe, of all civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy," etc. But the words "exclusive original" were omitted from this section by the Convention of 1875, and it now appears as Art. IV, sec. 27. Since this amendment, it has been held that the General Assembly may give to other courts, including the Superior

Courts, concurrent jurisdiction in such cases. *S. v. Anderson,* 80 N. C., 429; *Rhyne v. Lipscombe,* 122 N. C., 650. This authority has been exercised very generally by the Legislature in granting county courts and city courts concurrent jurisdiction with justices of the peace. Also it has been held that these courts may be given exclusive original jurisdiction of certain crimes committed within the corporate limits of a city, which were originally cognizable before a justice of the peace. *S. v. Doster,* 157 N. C., 634; *S. v. Baskerville,* 141 N. C., 811.

While it is true, sections 12 and 14, Article IV of the Constitution, provide for an allotment and distribution of certain powers among these inferior courts, recorders' courts, etc., yet these "special courts," as they were designated originally in the Constitution, were not given concurrent jurisdiction with justices of the peace *in civil matters* until after the change of 1875. *Oil Co. v. Grocery Co.,* 169 N. C., 521; *S. v. Lytle,* 138 N. C., 738; *Edenton v. Wool,* 65 N. C., 379; *Wilmington v. Davis,* 63 N. C., 582. The Convention, by several amendments, placed the matter again in the hands of the General Assembly. See Battle's History of the Supreme Court, 103 N. C., 475, and dissenting opinion in *Mott v. Comrs.,* 126 N. C., 866.

But has similar jurisdiction, in such cases, been given to the Superior Courts? This question must be answered in the negative, when dealing with the plaintiff's cause of action or when considering the genesis of a suit. *Shoe Store Co. v. Wiseman,* 174 N. C., 716; *Wooten v. Drug Co.,* 169 N. C., 64, and numerous other cases to like import. Exclusive original jurisdiction in civil actions, founded on contract, wherein the sum demanded, exclusive of interest, does not exceed two hundred dollars, is vested in the several justices of the peace by the express provisions of C. S., 1473. This has been modified to some extent by subsequent legislation in which other courts have been given concurrent jurisdiction with these courts of first instance. But, unless thus affected by some different statute, every such suit must *originate* in the court of a justice of the peace.

The case at bar, however, presents the question in relation to a counterclaim, pleaded in an action already pending and properly brought in the Superior Court. The jurisdiction, so far as the plaintiff's suit is concerned, is not attacked. It is admitted.

In sections 519 and 521, Consolidated Statutes, under the title of Civil Procedure, it is provided that the following may be set up by way of counterclaim:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action."

Again, C. S., 602, provides that the court may grant judgment in favor of the defendant for "any affirmative relief to which he may be entitled."

Under a proper construction of these statutes, it would seem that the judgment below on the verdict should be affirmed.

We are not here confronted with a constitutional barrier as in *Cheese Co. v. Pipkin*, 155 N. C., 394 (and similar cases), where the defendant undertook to set up in the magistrate's court, by way of counterclaim, a cause of action in excess of the limited jurisdiction of a justice of the peace. Nor does it appear that the decision in *Wiggins v. Guthrie,* 101 N. C., 661, is a controlling authority *contra*. In fact, no case has been found exactly in point which, under the doctrine of *stare decisis,* would require us to hold in accordance with the plaintiff's contention. On the other hand, the opinion in *McClenahan v. Cotten,* 83 N. C., 332, satisfactorily states the reasons for sustaining the judgment appealed from in the instant case. After discussing the sections of The Code relating to defenses and counterclaims, and comparing the old practice with the new procedure, *Dillard, J.*, speaking for the Court, says:

"The question now arises, how may a party use and rely on his cross-demand? The answer is, he may plead it or not at his will, but if he elect to plead it, he may do so, and then, if it be equal to or greater than the opposing demand, he may plead it in bar, as formerly, or plead it as a *defense*, so called, under The Code, the plea or defense having the operation merely to defeat the action, and not to admit of any judgment for an excess, or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counterclaim as introduced by The Code, and then the defendant will have judgment for the excess."

In *Wiggins' case* the plaintiff recovered $639.65. The defendant was allowed to use his counterclaim as a *recoupment* in reducing the plaintiff's demand, the Court saying: "This accorded to the defendant all the benefit to which he was entitled, and he should be content in being allowed to use it for this purpose. But the objection disappears in presence of the fact that precisely the same purpose was subserved whatever name be given to the defense. Inasmuch as the plaintiff recovered a much larger sum, whether a counterclaim, recoupment, or set-off, the opposing demand, if allowed by the jury, would necessarily be in effect a diminishing of the plaintiff's claim, and this, to some extent, would seem from the verdict to have been done, as the sum assessed by the jury is less by $25 than that demanded in the complaint, or it has been disallowed altogether." It is true the jurisdictional question was squarely presented and ruled upon in the Superior Court, and the judgment was affirmed on appeal. But the crucial point here debated was brushed aside as immaterial, because the plaintiff recovered, and the question of granting affirmative relief to the defendant never arose; or, at least, it became academic. There was nothing else to do but affirm the judgment. This identical procedure was pursued in *Coble v. Legg* at this term, apparently as a matter of course, and without question.

In *Garrett v. Love,* 89 N. C., 207, the point was raised that the defendant's cross-action did not come within the purview of the statute defining what might be set up by way of counterclaim, and that if it did, it was not properly pleaded. Upon this ground the Superior Court declined to enter judgment in favor of the defendant and dismissed the action at the cost of plaintiff. This was reversed on appeal, and it was held that an affirmative judgment should be entered in favor of the defendant.

In *Electric Co. v. Williams,* 123 N. C., 51, the amount set up by way of counterclaim was in excess of the jurisdiction of a justice of the peace; and, of course, the defendant was not entitled to an affirmative judgment because of the constitutional limitation. This case is in the same class as *Cheese Co. v. Pipkin, supra.*

In *Smith v. French,* 141 N. C., 6, it is stated: "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose."

The decision in *Yellowday v. Perkinson,* 167 N. C., 147, has no bearing upon the question of jurisdiction unless by implication, for there it was held that the plaintiff could not submit to a judgment of nonsuit without the consent of the defendant when a counterclaim was pleaded. The question under consideration was whether or not the allegations of the defendant were sufficient to constitute a counterclaim. The Court held that when such facts were alleged as would entitle the defendant to maintain a separate action against the plaintiff, legal or equitable, this would amount to a counterclaim. The sufficiency of the defendant's allegations was the point at issue. This distinguishes it from the case at bar.

The leading authority elsewhere, cited in support of the text in 24 R. C. L., 796, is *Dureson v. Blackmarr,* 117 Minn., 206. But, upon examination, it appears that the question involved in that case dealt only with a counterclaim in excess of the limited jurisdiction of a municipal court. In this respect, it is not unlike many cases in our own Reports touching the jurisdiction of a justice of the peace. And in every case so far examined the question apparently has been made to turn on the *limited* jurisdiction of the court. For a valuable collection of cases in point, see note 37, L. R. A. (N. S.), 606.

The case of *Griswold v. Pieratt,* 110 Cal., 259, as we understand it, is not an opposite persuasive authority, though it might appear to be from a reading of the syllabus only. It is provided in the Constitution of California that their Superior Courts shall have jurisdiction in all "cases at law . . . in which the demand . . . amounts to three hundred dollars." From this language it will be seen that the Superior Courts of that State are limited in their jurisdiction like our justices of the peace. They may not entertain a claim for less than $300, while our justices of the peace may not entertain a claim for more than $200. The limitations differ only in direction and amount, and not in kind. The Supreme Court of California in this case lays down the same principle as announced by our Court in *Cheese Co. v. Pipkin, supra;* the only difference being that in the California case the limitation is downward, while with us the limitation is upward.

The jurisdiction of our Superior Courts is general and not limited, except in the sense that it has been narrowed, from time to time, by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts. As said by *Furches, J.,* in *Mott v. Comrs.,* 126 N. C., 871: "The Superior Courts were (at the time of the adoption of the Constitution) courts of general jurisdiction, and when the jurisdiction of other courts, which were special, was taken out, the remainder was left as the jurisdiction of the Superior Courts."

It has been held with us in a number of instances that any counterclaim, coming within the purview of the statute, regardless of its amount, may be set up in a justice's court for the purposes of set-off and recoupment, as a bar or defense to the plaintiff's cause of action. But, of course, an affirmative judgment could not be entered on a counterclaim in this court unless it fell within the limitation of the jurisdiction of a justice of the peace. *Hurst v. Everett,* 91 N. C., 399. So it was said in *Lutz v. Thompson,* 87 N. C., 334, that while a justice could not affirmatively administer an equity, it might so far recognize it as to admit it to be set up as a defense, citing *McAdoo v. Callum,* 86 N. C., 419.

One of the most important purposes of the adoption of The Code system of pleading was to enable parties to determine and settle their differences in one action. The law favors the ending of litigation, and frowns upon the multiplicity of suits. Hence, whenever possible, in the construction of statutes, this wise and wholesome policy should be observed.

"The adjustment of demands by counterclaim or set-off, rather than by independent suit, is favored and encouraged by the law, to avoid circuity of action and injustice." *North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.,* 158 U. S., 596.

What is said here in no way militates against the settled doctrine of derivative jurisdiction where a case comes to the Superior Court on appeal from a justice of the peace (*Comrs. v. Sparks,* 179 N. C., 581; *McLaurin v. McIntyre,* 167 N. C., 350; *Robeson v. Hodges,* 105 N. C., 49; *Ijames v. McClamrock,* 92 N. C., 362); nor is it to be understood that the distribution among the different courts of constitutional and statutory powers is sought to be impaired in the least. These principles, already firmly established by numerous decisions of this Court, must be preserved in their full integrity, unless and until changed in a duly authorized manner. *Mott v. Comrs., supra; Tate v. Comrs.,* 122 N. C., 661. The only question here presented is one of procedure, involving no rule of property; and we think our present decision coincides with the intention of the Legislature, and is in keeping with the true meaning and spirit of our Code of Civil Procedure.

The exceptions relating to the statute of limitations must be overruled, for the reason that the statute is pleaded only as to a part of the account; and his Honor submitted the matter to the jury as a question of fact, which they have answered in favor of the defendant.

Plaintiff's demurrer to the defendant's counterclaim for want of jurisdiction was properly overruled.

Affirmed.

CLARK, C. J. concurring: Our statutes and decisions establish this: *An additional cause of action, or a counterclaim, in an action begun in the Superior Court is not required to be of any specific amount. It may be over or under $200.*

1. This is not forbidden by the Constitution, in which in 1875 the amendment struck out the requirement that the justice of the peace had "exclusive" jurisdiction of actions on contract under $200.

2. C. S., 507, provides that "The plaintiff may unite in the same complaint several causes of action of legal or equitable nature, or both," and other causes of action there specified, without limiting the amount. The limitation of $200 is only as to instituting a proceeding in the Superior Court.

3. C. S., 509 (2), provides that the defendant can set up "a statement of *any* new *matter* constituting a defense or counterclaim without repetition." This provides for any "new matter" constituting a counterclaim, without suggesting any limitation as to the amount.

4. C. S., 521 (1), requires merely that "the counterclaim must arise out of the contract or contracts set forth in the complaint as the foundation of plaintiff's claim *or* connected with the subject of the action," without any limitation as to the amount.

5. C. S., 521 (2) provides that *"any other* cause of action arising also on contract, and existing at the commencement of the action," without any suggestion of limitation, and there is nothing in the Constitution which requires such limitation, especially since the word "exclusive" was stricken out and Article XII, section 4 of the Constitution, adopted in 1875, authorized the Legislature to parcel out the jurisdiction of all the courts below the Supreme Court.

6. C. S., 2306, provides that in any action brought in a court of competent jurisdiction "it is lawful for the party against whom the action is brought to plead as a *counterclaim* the penalty" provided for usury, which is double the interest paid, but there is no provision that such counterclaim shall be as much as $200.

7. C. S., 3524, provides that when an action is brought for the recovery of property shipped or for loss or damage "The penalty herein provided for may be united in the same complaint." The limitation as to the amount of such penalty is $50.

Under all seven of the above heads for fifty years, in actions begun in the Superior Court, this Court has recognized, without a single decision to the contrary, that additional causes of action and counterclaims, whether arising on same or some other contract, or out of the same cause of action, or as penalty for usury, or a penalty on carriers for misfeasance as to the safe transportation or nondelivery of freight, can be entertained, irrespective whether the amount is under or over $200.

When the case begins in a justice of the peace court that court can render no judgment over $200, and when such case goes to the Superior Court there has been a conflict of decisions, cited and arrayed, *Holmes v. Bullock*, 178 N. C., 379, 380, whether a counterclaim *over* that amount can be set up by amendment and *adhuc sub judice lis est*, but there has been no case holding that a counterclaim less than $200 cannot be pleaded when the case began in the Superior Court.

The moving reason why the word "exclusive" was stricken out of the jurisdiction of a justice of the peace by the Convention of 1875 was not only to authorize other courts, including the Superior Court, to have jurisdiction in proper cases where the amount was under $200, but because, by pleading the counterclaim in the Superior Court, the whole matter could be adjusted, and the judgment would adjudge the balance due (whether to the plaintiff or defendant) between the two conflicting claims; whereas, if the defendant was forced to sue before the justice of the peace on a counterclaim under $200, instead of having the option to plead it as a counterclaim in the Superior Court, the plaintiff might collect his judgment in the Superior Court if the defendant had more than the homestead and personal property exemption, but the defendant (if not allowed to plead his counterclaim), when he recovered judgment before the justice, might be barred of collecting such judgment if the plaintiff in the first action had no more than the homestead and personal property exemption. *Lynn v. Cotton Mills*, 130 N. C., 621.

For this reason, as well as to prevent multiplicity of actions, a counterclaim has always been allowed at the *option* of the defendant, irrespective of amount, except in those cases above cited where the statute *requires* the counterclaim to be pleaded, and in all cases there is no hint of any limitation that a counterclaim should be in excess of $200. The jurisdictional amount for bringing action is fixed by the statute, both in the Superior and justices courts, but there is no such limitation as to pleading a counterclaim, and the only restriction as to amount of judgment is that a justice of the peace cannot give judgment above $200, whereas the Superior Court can render judgment for any amount, whether above or below $200, as in this case the plaintiff recovers judgment for $37.

Among the numerous cases in which jurisdiction of counterclaim *less* than $200 in the Superior Court has been recognized are the following:

1. At this term, in *Cotton Mills v. Hosiery Mills*, opinion filed 2 March, 1921, the plaintiff brought his action to recover $286.94, which the jury found to be correct, and the defendant filed two separate counterclaims arising at different times and on a different state of facts; one of the counterclaims pleaded was for $82.30, accruing in 1915, on which the jury found to be due the defendant $74.60; and on the second counterclaim, accruing four years later, the jury found to be due the defendant $1,684.60, with interest, and the court thereupon rendered a judgment in favor of the defendant and against the plaintiff for the difference, to wit, $1,427.86, which judgment this Court approved in an unanimous opinion.

This procedure was strictly in accordance with the Constitution, the spirit and letter of the Code of Civil Procedure, and the uniform practice of the courts as I have always understood them.

2. In the present case, the action was brought in the Superior Court upon allegations which gave that court jurisdiction, and the defendant pleaded two matters as counterclaims, and the jury found that there was due the plaintiff on his cause of action $37, and that there was due the defendant upon one counterclaim $63 and on another counter-

claim $45, and the judge rendered judgment in favor of the defendant against the plaintiff (all three matters having been fully tried out and determined by the jury) for the difference, to wit, $71. It is true that each of these counterclaims was for less than $200, as was one of the counterclaims in the case above cited, *Shaw Cotton Mills v. Acme Hosiery Mills.* Why should not the same rule prevail in both cases?

3. Also, at this term, in *Coble v. Legg,* the plaintiff brought an action for $452.50, and the defendant pleaded a counterclaim for $55. The jury found on the first issue that the defendant was indebted to the plaintiff $452.50 and on the second issue that the plaintiff was indebted to the defendant $55, and the court rendered judgment in favor of the plaintiff for the difference, $397.50, which was affirmed in this Court, which could not have been done unless the Superior Court had jurisdiction of the counterclaim.

4. In *Cooper v. Evans,* 174 N. C., 412, the court, *Hoke, J.,* gave judgment for the plaintiff, "deducting $25 for counterclaim," as per finding of jury on third issue.

5. In *Shell v. Aiken,* 155 N. C., 212, the plaintiff sued on a note for $600, and the defendant pleaded a counterclaim on a different transaction for $142, and the jury assessed the counterclaim at $100, and the court gave judgment in favor of the plaintiff for the difference.

6. In *Bank v. Wilson,* 124 N. C., 569 (defendant's appeal), the action was brought on a $400 note, and the defendant pleaded a counterclaim for a deposit of $100.36. This was disallowed not because under $200 (which would have prevented any discussion, if a valid defect), but because the counterclaim, not being connected with the original cause of action, was required to be one in existence at the commencement of the action. If being under $200 had deprived the court of jurisdiction of the counterclaim, no discussion on that ground would have been necessary.

7. In *Wilson v. Hughes,* 94 N. C., 182, the plaintiff brought his action to recover a horse to be sold under chattel mortgage, and the defendant pleaded as a counterclaim "damages by deceit or misrepresentation of $100." It arising out of the same transaction, the court held that it was a proper counterclaim, and upon the verdict of the jury on the issue of such damage, $5 more being found due on the counterclaim than the amount due by the defendant on the purchase of the horse, entered judgment for $5 in favor of the defendant. This was affirmed.

Very numerous cases to the same effect could be quoted, but the above represent every possible phase in which a counterclaim can be admitted, and in each of the above cases the counterclaim pleaded was less than $200.

8. C. S., 2306, recites that the penalty for usury "can be pleaded as a counterclaim in an action on the debt." In *Cobb v. Morgan,* 83 N. C., 211, where the note sued on was $600, and the defendant pleaded $120 usury as a payment, the court disallowed the latter simply because it was *not* pleaded "as a counterclaim."

9. C. S., 3524, also provides that in an action for the recovery of possession of property shipped and for loss or damage thereto, the penalty prescribed of $50 "may be united in the same complaint," and the same is true as to other penalties prescribed in that chapter, most of which, if not all, are necessarily under $200. These are independent causes of action in the Superior Court which, however, takes cognizance of them. Such joinder would be impossible if jurisdiction of the additional cause of action, the penalty under $200 which lies in contract, was required to be brought before a justice of the peace.

10. In *Levin v. Gladstein,* 142 N. C., 495, the court recognized the difference between the facts which would give jurisdiction to bring an action and that which would permit a counterclaim, saying that, while the justice of the peace had no jurisdiction to administer or enforce an equitable cause of action, he could take cognizance of an equitable defense, *Connor, J.,* saying: "It would be incompatible, with our conception of remedial justice under The Code system, to require the defendant to submit to a judgment and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the Constitution and the adoption of the Code of Practice." To apply that in this case, the plaintiff seeks to enforce his judgment for $37 but wishes to drive the defendant into an action in the justice's court to set up his counterclaims, which, as *Judge Connor* says, "Would be to restore one of the greatest inconveniences of the old system."

11. Among the large number of cases which, without any decisions to the contrary, have recognized the right to plead a counterclaim, or an additional cause of action, less than $200 in an action begun in the Superior Court, is *Bernhardt v. Dutton,* 146 N. C., 208, where *Walker, J.,* upheld the judgment asked for by the defendant on his counterclaim of $150, the plaintiff's cause of action being for the recovery of $400.

12. In *Puffer v. Lucas,* 112 N. C., 382, 384, the defendant pleaded counterclaims of $20, $26, and $70, and the court, modifying the judgment, provided that the defendant should have reasonable time to pay the sum found due the plaintiff "after deducting the counterclaims."

13. In *McKinnon v. Morrison,* 104 N. C., 354, the action began in the Superior Court to recover on an agricultural lien and to foreclose a mortgage on a horse; the defendant pleaded a "counterclaim of $90," and it was held that if the Superior Court did not have jurisdiction

of the counterclaim it could be taken advantage of on appeal, but the Court held that the Superior Court had jurisdiction, and the judgment was affirmed. That case (though not on this particular ground) has been more often cited and affirmed than any other in our Reports. See citations in 2 Anno. Ed. covering nearly a page.

14. In *Guano Co. v. Tillery,* 110 N. C., 29, the action was on a promissory note for $418, and the defendant pleaded a counterclaim for defect in the value of the fertilizer of $17 on ten tons, *i. e.,* $170, and there was no objection made by the court against the jurisdiction of the counterclaim.

15. In *Moore v. Bank,* 173 N. C., 183, the Court, *Hoke, J.,* quoted and approved the following from *Roller Mill v. Ore and Steel Co.,* 152 U. S., 596: "The adjustment of demands by counterclaim or set-off, rather than by independent suit, is favored and encouraged by the law to avoid circuity of action and injustice, citing *R. R. v. Smith,* 21 Wall., 255."

16. In *Lynn v. Cotton Mills,* 130 N. C., 621, the Court pointed out that counterclaims are favored because then the successful party recovers judgment for the difference; whereas, if the defendant is driven to another court to obtain judgment, the homestead and personal property exemption could be set up against such judgment, though the plaintiff in the Superior Court might have recovered judgment and collected it in that court.

17. In *Piano Co. v. Kennedy,* 152 N. C., 197, the jury found on the first issue in favor of the plaintiffs, $111.80, and on the second issue in favor of the defendant, $150, and the court rendered judgment in favor of the defendant for the difference. While the Court, *Brown, J.,* reversed the judgment, it was upon the legal construction of the counterclaim presented, and not upon any defect of jurisdiction of the counterclaim which, if valid, would have ended the controversy without discussion.

18. In *McCall v. Zachary,* 131 N. C., 466, the Court held that where an action has been brought to recover the fees of an office amounting to $500 there could be joined in the same action a demand for judgment against the sureties for $200 on the bond.

19. In *Adams v. Beasley,* 174 N. C., 118, the action was for $350, and the defendant pleaded in defense a payment of $50 and, further, a counterclaim for another $50. The payment was admitted, but *Allen, J.,* held that the burden of proof was upon the defendant as to the counterclaim, and he not having offered any it was disallowed, thus recognizing jurisdiction of the counterclaim.

The statute allows to be pleaded in the Superior Court, counterclaims and additional causes of action, without limitation as to the amount.

If, therefore, when the Superior Court has jurisdiction an additional cause of action can be pleaded less than $200 in favor of the plaintiff, necessarily counterclaims for less than $200 can be pleaded by the defendant. The cases in which additional causes of action under $200 have been pleaded are too numerous to be selected, but we mention only three:

20. In *Grocery Co. v. R. R.*, 136 N. C., 397, there was a recovery of $320 penalty and for additional cause of action of $10.07 for nondelivery of the goods, separate issues being submitted as the causes of action were distinct.

21. In *Meredith v. R. R.*, 137 N. C., 478, it is held that the plaintiff could recover for the damage to his household goods and furniture and also the penalty for unreasonable delay. One of these causes of action was for less than $200.

22. Revisal, 2634, provided that the cause of action for the value of goods lost could be joined in the same action with an action to recover the penalty, and in *Robertson v. R. R.,* 148 N. C., 324, the Court said, "This would be so without the statutory provision." In this and numerous other cases either the penalty or the value of the goods was under $200.

It would seem hardly necessary to cite further cases in support of the uniform practice of this Court authorized by the statute and the Constitution, and which has never been denied by any decision, that "a counterclaim or additional cause of action less than $200 can be set up in an action begun in the Superior Court." Very numerous other cases to that effect, showing the uniform practice of the courts, however, can be found and no decisions to the contrary.

At one time it was endeavored to narrow the right to plead counterclaims arising out of the transaction set out in the complaint to cases where the action was on contract. In *Bitting v. Thaxton*, 72 N. C., 541, it was decided, according to the broader spirit of The Code, that such counterclaim could be pleaded whether the action was for a tort or on contract, and it has been so held ever since.

It was also contested for a long while whether a counterclaim connected with the plaintiff's cause of action must be one matured before the action commenced, and the authorities were conflicting on that point, but the matter was finally set at rest by *Hoke, J.*, in *Smith v. French*, 141 N. C., 6, which held that "right and justice required" that such counterclaim could be allowed because "It is the policy of The Code that all matters in controversy should be settled in one action"; and he further said that, for the same reason and according to the statute, "Judgment could be rendered for the defendant if his recovery was in excess of that allowed the plaintiff." Saying further, on page 10:

"Even if the present opinion should be found to conflict with some former decision, it is only a question of procedure, not involving a rule of property, and we think it better that our present construction of the statute should now be declared the true one, as more in accord with the spirit and letter of our Code, which, as heretofore stated, defines and contemplates that all matters growing out of the same controversy should be adjusted in one and the same action." This has always been adhered to since.

The judgment in favor of the defendant for the difference is authorized by C. S., 602, which provides:

1. "Judgment may be given for or against one or more of several plaintiffs and for one or more of several defendants; and it may determine the ultimate rights of the parties of each side, as between themselves."

2. "It may grant to the *defendant any affirmative* relief to which he may be entitled."

In the court of the justice of the peace, when a counterclaim exceeds $200, it cannot render judgment on the counterclaim because above his jurisdiction upon its face, and if found to be *bona fide,* he cannot adjudge how much is due upon it but merely that it bars recovery on the plaintiff's claim, because the court of the justice of the peace cannot render judgment for more than $200.

In the Superior Court, the sum demanded in good faith confers jurisdiction, and when this is done the court is not forbidden to give judgment for less than $200. In this case, for instance, the recovery by the plaintiff is adjudged at $37. The statute, C. S., 1436, gives the Superior Court jurisdiction "of all civil actions whereof exclusive original jurisdiction is not given to some other court," and the Constitution, Art. IV, sec. 27, while it gives justices of the peace jurisdiction, "under such regulations as the General Assembly shall prescribe, of civil actions founded on contract wherein the sum demanded does not exceed $200," does not contain the word "exclusive," which was stricken out of that section by the Convention of 1875, which also inserted a new section (12) in that article, which provides that the "General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best."

It is true that C. S., 1473, retains the original statute, which was enacted prior to the amendment of 1875, and gave the justice of the peace "exclusive and original jurisdiction of all civil actions founded on contract" except where the principal is above $200 or where the title to real estate is in controversy. But this section must be read in connection with the Constitutional Amendment of 1875 and the provisions of C. S., 507, which provides that in the Superior Court "the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature or both," and other causes of action there specified, without limiting the amount. And it must also be read in connection with C. S., 519 (2), 521 (1), and 521 (2).

Taking all these sections together, it is plain that the Legislature has allotted to the Superior Court jurisdiction of any additional causes of action and of all counterclaims, though under $200, provided they come within the purview of those sections and the requirements there specified, none of which requirements contain a limitation as to the amount for "pleading a counterclaim is optional." *Mauney v. Hamilton*, 132 N. C., 306. This has been the uniform practice in the courts and on appeal, without question, heretofore. For instance, the Court has held that where different causes of action exist between plaintiff and defendant, all of the same character, to prevent multifarious actions, the court will permit joinder for convenience, *Hancock v. Wooten*, 107 N. C., 9; *Heggie v. Hill,* 95 N. C., 303; *Williams v. R. R.,* 144 N. C., 502, and cases there cited, in which additional causes of action have been joined, irrespective of amount. See, also, cases in the notes to C. S., 507, and its various subheads.

In like manner C. S., 519 (2), provides that the defendant can set up "a statement of *any* new matter constituting the defense or counterclaim without repetition." There is no limitation as to the amount of the counterclaim which may be set up, and C. S., 521 (1), prescribes merely that the counterclaim must arise "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim *or* connected with the subject of action," or C. S., 521 (2), "any other cause of action arising also on contract and existing at the commencement of the action." Under that section are many instances, and on examination it will be found that not in any case whatever has a counterclaim been ever disallowed because less than $200. The language is, "*any other cause of action arising also on contract*," without suggesting any limitation as to the amount. Neither the Constitution nor any statute restricts the jurisdiction of the Superior Court over additional causes of action, nor of counterclaims, to those over $200, when that court has acquired jurisdiction of the controversy upon the claim set out in the complaint which may be increased by the additional cause of action or reduced by the counterclaim.

C. S., 1436, defining the jurisdiction of the Superior Court, means only the jurisdiction which is necessary to be set out in good faith to confer original jurisdiction on that court of the action, and must be construed in connection with C. S., 507, authorizing a joinder of additional causes of action, which may be of "any" amount, and C. S., 519 (2), and 521 (1) and (2), authorizing counterclaims also, without any limitation as to the amount. Either of these three sections is as valid as the other, and all three must be construed together. There is no conflict between them. The first section states the amount which will confer jurisdiction of the action upon the Superior Court; the other two are supplementary to it by permitting additional causes of action without limitation as to the amount, and allow counterclaims without prescribing any limitation upon the amount or forcing the defendant to sue in the justice's court. He has the option to set it up in the pending action.

The statute does not confer upon the Superior Court jurisdiction of an action brought for less than $200 (except where concurrent jurisdiction is given), but when the court has acquired jurisdiction, it should proceed to judge and determine the whole matter without restricting the amount of any additional cause of action or of the counterclaim. This is the soul and spirit of the new Code of Procedure. *Benton v. Collins*, 118 N. C., 196, and *Fisher v. Trust Co.*, 138 N. C., 224, citing numerous cases.

If this were not so, we would have, in this case, the Superior Court giving the plaintiff judgment for $37 and refusing the defendant judgment for the amount found to be due him. If this were permitted, there would not only be the spectacle of the defendant with a valid counterclaim being put out of court to go back into another court, at needless expense, to litigate and determine the identical matter which, as in this case, has been fully tried out and determined by a court and jury, but we should have the additional difficulty that a plaintiff might thus recover judgment in the Superior Court and obtain satisfaction out of a defendant when the latter might be barred of collecting any judgment which he would later secure before the justice of the peace, because the plaintiff might have no property over and above his exemption. Those who are familiar with the discussions on the subject of striking out the word "exclusive" at the time of the Constitutional Convention will remember that both these two reasons were given: the necessity of avoiding unnecessary litigation and to avoid depriving the defendant sued in the Superior Court of utilizing his counterclaim against the plaintiff's demand, if required to take a separate judgment in the court of the justice of the peace against which the plaintiff in the Superior Court could use his exemptions as a bar. *Lynn v. Cotton Mills*, 130 N. C., 621 (in which, however, the word "not" is left out of headnote 2).

The distinction should be kept clearly in view between the allegations which are necessary to confer original jurisdiction in an action brought in the Superior Court or to bring it before the justice of the peace, and what may be alleged as an additional cause of action incident to settling the controversy between the same parties or as to any counterclaim allowed by the sections above quoted, which are necessary for complete settlement of the matters in controversy between parties to an action already in the Superior Court. This will reconcile the provisions of the Constitution, the statutes, the decisions, and the uniform practice of the Court, which are that when the Superior Court has obtained jurisdiction it also has jurisdiction of additional causes of action and of counterclaims, irrespective of amount, in order to settle the entire controversy.

When in *Burbank v. Comrs.*, 92 N. C., 260, it is said that if the sum sued for is less than $200 the justice of the peace alone has jurisdiction, it simply meant that upon such allegation an *action* can be brought only in that court.

The later cases do not contradict *Wiggins v. Guthrie,* 101 N. C., 677, that a recoupment less than $200 is valid in the Superior Court. In *Electric Co. v. Williams,* 123 N. C., 54, it is said: "Counterclaim is a creature of The Code and is an extension of the set-off, enlarging the class of claims that may be pleaded and enabling the defendant to obtain judgment for the excess." In *Smith v. French*, 141 N. C., 2, the Court, *Hoke, J.*, held that the defendant was entitled to a judgment "for any excess over and above the plaintiff's debt." These cases have been often cited since and are now the settled law.

In *Yellowday v. Perkinson*, 167 N. C., 147, *Allen, J.*, held that "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh *any and every phase* of a given controversy in one and the same action, and should be liberally construed." It has never been denied heretofore that in the Superior Court any amount whatever can be pleaded as a counterclaim. The language of C. S., 519, is "*any* new matter constituting a defense or counterclaim." To same purport is C. S., 521. The court acquires jurisdiction of the whole controversy upon the plaintiff's demand.

Not a single case can be found in all the Reports since 1868 that in an action begun in the Superior Court a counterclaim has been denied upon the ground that it was less than $200, but in countless cases in everyday practice, and in the decisions, such counterclaims have been allowed without question. Hence so few decisions exactly in point. It would be an anomaly, indeed, if, when the Superior Court is seized of jurisdiction by the complaint, the defendant would not have the benefit of *any* counterclaim to reduce the plaintiff's recovery.

The authorities are uniform that, as provided by C. S., 602, "The defendant may recover in the Superior Court for any excess in favor of the defendant against the plaintiff." *Electric Co. v. Williams,* 123 N. C., 51, citing *Hurst v. Everett,* 91 N. C., 405; *Wilson v. Hughes,* 94 N. C., 187. To same purport, *Yellowday v. Perkinson,* 167 N. C., 147; *Cooper v. Evans,* 174 N. C., 412; *Slaughter v. Machine Co.,* 148 N. C., 472. The cases are numerous to this effect. There are many instances of judgment in favor of the defendant for the excess as a matter of course and without discussion. *Not a single case* can be found where judgment in favor of the defendant for excess was denied in the Superior Court.

The authorities in other States are to the same effect, 25 A. & E. (2 Ed.), 498, 609. The notes on the latter page cite many authorities. To the same effect, 34 Cyc., 761, citing *Francis v. Edwards,* 77 N. C., 276, and other cases, and *McClenahan v. Cotton,* 83 N. C., 332. There are cases like *Raisin v. Thomas,* 88 N. C., 148, which hold that in the justice's court the justice cannot render judgment for a counterclaim over $200, but can allow it only to defeat the plaintiff's recovery. This is because the justice, being a court of limited jurisdiction, he cannot render judgment *above* $200, but in the Superior Court judgment can be rendered for any amount proven, whether under or above $200, if jurisdiction of the controversy is acquired by plaintiff's demand.

In 24 R. C. L., 884 (sec. 93), it is said that "Under the codes the defendant may recover on a counterclaim or set-off any excess above the plaintiff's recovery."

The above decisions and many others, and the uniform practice of the Court, establish two propositions:

1. That in an action brought in the Superior Court, an additional cause of action, or a counterclaim, in any amount may be pleaded, whether over or under $200. The court is seized of jurisdiction by the plaintiff's claim.

2. That if the verdict upon the counterclaim is greater than upon the plaintiff's demand, the defendant is entitled to judgment for the excess.

ALLEN, J., dissenting: The decision of the Court is that, in an action begun and properly constituted in the Superior Court, a defendant may have an affirmative judgment on a counterclaim arising *ex contractu,* when the sum demanded is less than $200.

The ground of the decision is that, as the word "exclusive" was omitted from the Constitution in 1875 in defining the jurisdiction of justices of the peace, the General Assembly now has the power to confer on the Superior Court concurrent jurisdiction in actions on contract when the amount is less than $200, and that it has exercised this power in sections 519 and 521 of Consolidated Statutes, wherein it is provided that, in an action arising on contract, "any other cause of action arising also on contract," etc., may be pleaded as a counterclaim, and in section 602 that the court may grant judgment in favor of the defendant for "any affirmative relief to which he may be entitled."

I have examined the authorities carefully, and in my judgment the conclusion reached by the Court violates a well established and sensible rule of statutory construction, which has been approved in our decisions, is in direct opposition to several of our decided cases, and has no authority to support it.

This is a statement which ought not to be made unless it can be proved, and it ought to be supported by something more than a bare assertion that it has been held otherwise for fifty years, followed by a list of authorities, selected without regard to their application to the point in issue.

1. Does the decision violate a rule of statutory construction? "Whatever contradiction may appear to exist between the several sections of the Revisal—originally different statutes—is met by construing them as one statute, as, by their enactment as a part of the Revisal, they become." *Connor, J.,* in *Edwards v. Sorrell,* 150 N. C., 715.

"The Revisal must be construed together as one statute." *S. v. Holder,* 153 N. C., 608.

The same principle of course applies to the Consolidated Statutes.

"As a counterclaim is in substance an action wherein affirmative relief is sought by the defendant against the plaintiff, statutes permitting the interposition of counterclaim are construed in connection with other statutes limiting the amount over which the court has jurisdiction, and it is generally held that to entitle a defendant to be heard thereon the cause of action stated by him must be within the limits of the court's jurisdiction. The court can no more exceed its jurisdiction on his demand than it can on the demand of the plaintiff, for the limitation as to jurisdiction applies to both parties to the action." 24 R. C. L., 796.

Conceding then, for the purpose of this discussion only, that since the omission of the word "exclusive" from the Constitution in 1875 the General Assembly has had the power to confer concurrent jurisdiction on the Superior Court, when the sum demanded is less than $200, and that the language of sections 519, 521 and 602, standing alone, would be an exercise of this power, these sections must be read and construed with section 1473 of Consolidated Statutes which says, "Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except (1) wherein the sum demanded, exclusive of interest, exceeds two hundred dollars," and section 1436, "The Superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court."

It therefore appears when the Consolidated Statutes is considered as one act, and effect given to all its provisions, that the General Assembly has refused to confer concurrent jurisdiction on the Superior Court, that the jurisdiction of the justice of the peace is exclusive, and consequently, applying the rule of construction that "Statutes permitting the interposition of counterclaims are construed in connection with other statutes limiting the amount over which the court has jurisdiction," "any other cause of action," "any affirmative relief" in the statute on counterclaim mean "any cause of action" within the jurisdiction of the court.

It is not only expressly declared by statute that the jurisdiction of the justice is "exclusive," but this has been held in at least two decisions of this Court.

The Court says in *Burbank v. Comrs.,* 92 N. C., 260, in which the action was commenced in the Superior Court, and the sum demanded was less than $200, "If the sum of money mentioned is due to the *feme* plaintiff and recoverable, it is obvious that the court of a justice of the peace *alone* could have jurisdiction of the action to recover it," and in *Powell v. Allen,* 103 N. C., 49, "There are two insuperable obstacles that prevent such recovery; first, the Superior Court did not have original jurisdiction of the sum of money demanded. It being less than two hundred dollars, was within the *exclusive jurisdiction* of the court of a justice of the peace."

It is also held that the limit as to jurisdiction applies to counterclaims.

"A true counterclaim, such as that at bar, to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded." *Electric Co. v. Williams,* 123 N. C., 55.

2. Is the conclusion of the Court contrary to the authorities here and elsewhere?

The case of *Wiggins v. Guthrie,* 101 N. C., 677, is a direct authority against the decision of the Court.

In that case the action was brought in the Superior Court to recover over $600 alleged to be due by contract. The defendant denied the indebtedness and set up a counterclaim due by contract, less than $200, and demanded an affirmative judgment.

The judge of the Superior Court ruled that as the amount alleged in the counterclaim was less than $200 the defendant could not have judgment, and this ruling was affirmed on appeal, the Court saying on this question: "The next exception is to the ruling made at the commencement of the trial, that what the answer sets up as a counterclaim being less than $200, and cognizable in a justice's court only, could not be enforced as a demand for affirmative relief, but the defendant could avail himself of it as a recoupment in reducing the plaintiff's demand. This accorded to the defendant all the benefits to which he was entitled, and he should be content in being allowed to use it for this purpose."

It thus appears that the question arising in this case was presented in the *Wiggins case* by exceptions duly taken and that the Court, instead of brushing it aside, decided it.

In *Electric Co. v. Williams, supra,* the Court says: "A true counterclaim, such as that at bar, to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded."

It is also opposed to the true test by which the right to plead a counterclaim is to be determined, as laid down in the decided cases.

"The criterion for determining whether a defense set up can be maintained as a counterclaim is to see if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such cause of action is a counterclaim, and it must disclose such a state of facts as would entitle the defendant to his action as if he were plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and, like it, contain a plain and concise statement of the facts constituting a cause of action." *Garrett v. Love,* 89 N. C., 207.

"Unless a defendant has some matter existing in his favor and against the plaintiff, on which he could maintain an independent action, such claim would not be a counterclaim." *Askew v. Koonce,* 118 N. C., 532.

"When facts are alleged which would entitle the defendant to maintain a separate action against the plaintiff, legal or equitable, they amount to a counterclaim." *Yellowday v. Perkinson,* 167 N. C., 147.

The quotations from *Garrett v. Love* and *Askew v. Koonce* are copied and approved in *Turner v. Livestock Co.,* 179 N. C., 460, and if the principle there laid down still prevails, the defendant in this action cannot have an affirmative judgment on his counterclaim, because he could not maintain an action in the Superior Court on the facts therein alleged.

The courts elsewhere have the same view of the statute allowing a counterclaim to be pleaded.

"A counterclaim is a cross-action against the plaintiff, and to entitle a defendant to be heard thereon in that court the cause of action stated by him must be within the limits of the court's jurisdiction. The court can no more exceed its jurisdiction on his demand than it can on the demand of the plaintiff, for, as remarked by *Chief Justice Casseday* in *Martin v. Eastman,* 109 Wis., 286, 85 N. W., 361, the limitation as to jurisdiction applies to both parties to the action." *Duresen v. Blackmar,* 117 Minn., 206.

There is a case, in another jurisdiction, which is exactly like the one now under consideration, where there are the same Code provisions as to counterclaims, as to justices of the peace and as to appeals from their decisions to the Superior Court, the only difference being that the limit of the jurisdiction of justices of the peace in that State is $300 instead of $200, as it is in this State. But this is manifestly immaterial. The counterclaim in this case is based on a contract different from the one upon which plaintiff brought his action. The case referred to is *Griswold v. Pieratt*, 110 Cal., 259, and the third headnote, which fully states the question involved and the decision thereon, is as follows: "*Jurisdiction—Counterclaim—Justice's Court.*—In an action in the Superior Court arising upon contract, a counterclaim arising upon a different contract from that pleaded by the plaintiff, not set up solely as a defense but as a ground for an affirmative judgment against the plaintiff, is not within the jurisdiction of the Superior Court where the amount of the counterclaim is less than three hundred dollars, and any action thereupon must be by independent suit in the justice's court. The Court held that while it, the defendant's claim, might be set off against plaintiff's cause of action, no affirmative judgment could be given in favor of the defendant for the excess." (Taken from opinion of *Walker, J.*)

It is attempted to distinguish this case upon the ground that the constitutions of California and North Carolina differ, the Court saying, however, "The only difference being that in the California case the limitation is downward while with us the limitation is upward."

I fail to see the difference in the legal effect of a downward or upward course, or that a well-grounded distinction can be drawn as to the jurisdiction of the Superior Court between a constitution like ours, which gives to the justice jurisdiction of matters of contract when the sum demanded does not exceed $200, and to the Superior Court all over that amount, and one like California's, which confers on the Superior Court jurisdiction of all amounts over $300 and on justices of all under that amount.

It is simply a difference in the mode of expression.

Again, the statute relating to counterclaims applies to actions before a justice of the peace (C. S., 1500, Rule 16), and if "any other cause of action," includes all causes of action without regard to amount or jurisdiction, when applied to counterclaims in the Superior Court, as the Court holds, the logical deduction is that the same construction must be given to the same language in the same statute as applied to counterclaims before a justice, and a defendant sued for $100 may therefore, on the authority of this case, plead a counterclaim of $1,000 and obtain judgment for $900 before a justice, which is directly opposed to *Cheese Co. v. Pipkin,* 155 N. C., 396, and other cases.

3. Is there any authority which supports the decision of the Court? A complete answer to this question would require an analysis of each case cited in the opinion of the Court and in the concurring opinion of the Chief Justice, which would unduly lengthen this opinion, and I shall therefore only examine the first three cases in each opinion cited in support of the decisions of the Court, assuming that these are as pertinent as any referred to.

It is noticeable that the learned Justice writing the opinion of the Court refers to no case which he says is in point, and that he devotes most of the discussion to an examination of authorities against the view expressed by him.

He does however cite, as supporting his position, *McClenahan v. Cotton,* 83 N. C., 332; *Garrett v. Love,* 89 N. C., 205, and *Smith v. French,* 141 N. C., 6.

Marshall, C. J., says in *U. S. v. Burr,* 4 Cr., 470, that "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered," and we must therefore see what is in these cases.

In the *McClenahan case* the action was commenced before a justice to recover $173.20, and the defendant pleaded a judgment for $201, remitting, however, all in excess of the plaintiff's claim. The judge of the Superior Court applied the judgment to the extinguishment of the plaintiff's cause of action, and this was approved on appeal.

The action was not in the Superior Court, and there was no affirmative judgment in favor of the defendant.

In the *Garrett case* the action was commenced before a justice to recover on a note for $130, subject to certain credits, and the defendant pleaded a counterclaim of $85.

In the Superior Court the judge refused to render judgment for the defendant for the difference between the balance due on the note and the $85 note, and this was properly reversed on appeal.

This case has no bearing on the question raised on this appeal except it lays down the true test of a counterclaim, which we have already quoted.

The *French case* was commenced in the Superior Court to recover certain personal property conveyed to the plaintiff by chattel mortgage, and the defendant, after admitting the plaintiff's right to possession of the property, alleged that the plaintiff had seized in the action and converted to his own use property of the value of $700.

The plaintiff's cause of action and the counterclaim were within the jurisdiction of the court, and the only question debated was whether the counterclaim could be allowed, since it arose after the commencement of the action, and the Court held it should be as it was connected with the plaintiff's cause of action.

I say confidently, after an examination, that no case cited in the opinion has any more bearing on the question before us than those referred to, and in my judgment they have none.

In the opinion of the Chief Justice he cited *Cotton Mills v. Hosiery Mills, ante,* 33; *Coble v. Legg* (at this term); *Cooper v. Evans,* 174 N. C., 412; *Shell v. Aiken,* 155 N. C., 212, and other cases.

In the *Cotton Mills case* a counterclaim, consisting of $82.30 due by one contract and of $1,684.60 due by another, was allowed, but upon the familiar principle that the aggregate of the sums demanded determine jurisdiction. In other words, an action may be maintained in the Superior Court on two notes of $150 each, because the sum demanded exceeds $200, and if so, the same could be pleaded as a counterclaim. *Martin v. Goode,* 111 N. C., 288.

In *Coble v. Legg* there was no affirmative judgment for the defendant, but the court credited a claim due the defendant of $55 on the debt of the plaintiff of $452.50 and gave judgment for the plaintiff for the difference, which is always permissible.

In *Cooper v. Evans* a reference to the printed record shows that the defendant demanded damages in excess of $200, which gave the Superior Court jurisdiction, and it appears from the opinion that no judgment was rendered in favor of the defendant but that, as in the last case, his recovery was credited on the plaintiff's claim.

In *Shell v. Aiken* the same course was pursued—$100 credited on $400 due the plaintiff.

In *Wilson v. Hughes,* 94 N. C., 182, there was an affirmative judgment for the defendant upon a claim of less than $200, but the counterclaim was in tort to recover damages for false representation and deceit in the sale of a horse, and the Superior Court had jurisdiction.

WALKER, J., concurs in this opinion.

N. S. THOMPSON v. BOARD OF COMMISSIONERS OF PERSON COUNTY.

(Filed 27 April, 1921.)

Sheriffs—Fees—Salaries—Duties—Distilleries—Statutes.

The fees or emoluments incident to a sheriff's office enumerated in Rev., 2777, and extended by ch. 807, Public Laws of 1909, to allowance for the seizure and destruction of illicit distilleries, are excluded by a public-local law applicable to a certain county, subsequently enacted, but prior to the commencement of the term of the incumbent, wherein it is provided that the sheriff shall turn over to the county treasurer all moneys collected from fees, and receive a specified sum as a salary in lieu of his fees, with exception only of certain fees allowed to his township deputy in certain instances, the duty to seize the illicit distilleries being the same as any other required of him as sheriff of the county.

APPEAL by defendant from *Horton, J.,* at February Term, 1921, of PERSON.

Civil action brought by plaintiff to recover of defendant, board of commissioners, twenty dollars for each and every illicit distillery seized and captured by him during his term of office as Sheriff of Person County, from December, 1912, to December, 1920. Plaintiff's claim is based upon ch. 807, Public Laws 1909, which provides that it shall be the duty of the sheriff of each county to search for and seize any illicit distillery, and that he shall be allowed the sum of twenty dollars for every such distillery so seized and destroyed according to the provisions of said act.

Defendant filed a demurrer to the complaint bottomed on ch. 214, Public-Local Laws 1911, which provides that, beginning with the first Monday in April, 1911, the public officers of Person County shall be placed upon a salary basis; and that the sheriff "shall receive a salary of fifteen hundred dollars per annum in lieu of all other compensation whatsoever," etc.

Judgment was entered overruling the demurrer, and defendant appealed.

F. O. Carver for plaintiff.
Robert P. Burns for defendant.

STACY, J. We think the demurrer should have been sustained under authority of *Mills v. Deaton*, 170 N. C., 386, and *Abernethy v. Comrs.*, 169 N. C., 631.

The method of remunerating the officers of Person County for their services was changed from the old fee system to a salary basis by ch. 214, Public-Local Laws 1911. This law provides (section 1) that the sheriff of said county may appoint a deputy in each township, who shall receive the fees for serving processes of all kinds and commissions on executions. Section 2 provides: "All other fees, commissions, profits, and emoluments of all kinds now belonging or appertaining to or hereafter by any law belonging or appertaining to the sheriff by virtue of his office shall be faithfully collected by him and turned over to the treasurer of said county, to be disposed of as hereinafter provided." It is stipulated in section 4 that "the said sheriff shall receive a salary of $1,500 per annum in lieu of all other compensation whatsoever, and shall appoint one office deputy at a salary of $500 per annum."

The fees and emoluments incident to the sheriff's office at the time of and prior to the passage of this act were those enumerated in section 2777 of the Revisal of 1905, plus commissions derived from the collection of taxes and allowances made to sheriffs under ch. 807, Public Laws of 1909, for the seizure and destruction of illicit distilleries. It was as much the duty of the sheriff to seize a distillery when used for the manufacture of intoxicating liquors, in violation of the laws of North Carolina, as it was to serve a summons, and he was made an allowance by statute for the one as well as for the other. The obligation and corresponding reward, in both instances, were reciprocal and coequal. We think the two stand upon a parity and were affected alike by the new law.

In lieu of all such fees and compensation whatsoever incident to the sheriff's office, it was provided in the salary act for Person County that he should receive a fixed stipend of $1,500 per annum. This was the law when plaintiff was elected and inducted into office on the first Monday in December, 1912. His yearly compensation was then fixed, and under the clear wording of the statute he may not receive more for discharging his duties as sheriff of said county.

The case of *Comrs. v. Bain,* 173 N. C., 377, is easily distinguishable from the one at bar, as the facts there presented are materially different from those now appearing. That case dealt only with the uncollected tax levies held by the retiring sheriff. Here a different question is involved, and no change in the law occurred during the plaintiff's term of office.

Let judgment be entered dismissing the action with costs.

Reversed.

JOHN BARKER AND W. T. SOCKWELL v. JEFFERSON STANDARD LIFE INSURANCE COMPANY AND COUNTY OF GUILFORD.

(Filed 27 April, 1921.)

APPEAL by plaintiffs from *Finley, J.*, at January Term, 1921, of GUILFORD.

This is an action against the defendant insurance company for an injunction against the erection of a building upon that portion of the property bought by it from its codefendant, the County of Guilford, which is within 18½ feet of the plaintiffs' line, claiming that they are the owners of an easement therein. The court rendered judgment upon the pleadings against the plaintiffs, who appealed.

R. C. Strudwick, Wm. P. Bynum, Manly, Hendren & Womble for plaintiffs.

Wilson & Frazier, Brooks, Hines & Kelly for defendants.

CLARK, C. J. This case presents the same question, as to the same strip of 18½ feet of land, in controversy in *Guilford v. Bynum, post,* 288, and the two cases were argued together. The decision in that case, affirming the unencumbered title in the 18½ feet in question to be in the defendant life insurance company, applies equally in this case, and it is unnecessary to do more than refer to the opinion in that case and to *Guilford v. Porter,* 170 N. C., 310; and *S. c.,* 171 N. C., 356, which were held in the case just filed to be *res judicata* of this controversy. The whole matter was fully discussed in those cases, and it was distinctly held that there was no easement in the plaintiffs in any part of the land conveyed by the county to the insurance company. We can add nothing to what was there said.

Affirmed.

JOHN BARKER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY AND THE COUNTY OF GUILFORD.

(Filed 27 April, 1921.)

1. **Judgments—Estoppel—Matters Concluded.**

A judgment estops between the same parties, concerning the same lands in controversy, when the nature of the claims is the same as to title, involving the equity of removing a cloud therefrom as to all claims of easements, not only as to all questions actually litigated, but as to all that were determined or necessarily involved in the decision of the former action.

2. **Counties — Title — Public Squares — Abutting Owners—Prescriptive Rights.**

Where a county continues in possession of its open public square continuously to the time of its recent deed to a purchaser, an adjoining owner cannot acquire a prescriptive right of easement therein.

3. **Judgments—Counties—Title—Public Squares—Easements—Estoppel.**

Where a county has brought suit to remove the cloud from the title to its public square, including all claim of easement therein by abutting owners, one of such owners, the plaintiff in the present action and a party in the former one, is estopped by the judgment rendered in the county's favor in the former suit from setting up a counterclaim for damages arising from the taking of such easement by the subsequent grantee of the county, which has acquired title to the entire square by the deed of the county.

APPEAL by plaintiff from *Finley, J.,* at February Term, 1921, of GUILFORD.

This action is against the defendant insurance company and the county of Guilford, alleging that the plaintiff is owner of an easement 10 feet in width over land purchased by the insurance company from its codefendant, the county of Guilford, and that the insurance company has obstructed said alleyway by placing a large brick building thereon, and asking for $10,000 damages. The defendant insurance company answered and pleaded by way of counterclaim that it was the owner in fee of the tract of land known as the "Court House Square" (this being the tract over which the plaintiff claims an easement); that the insurance company acquired title to said land from the county of Guilford by deed, 2 May, 1917, and that at the time the plaintiff acquired title to the tract of land, which he claims is a dominant tenement, the county of Guilford was the owner of the land which he now claims is servient thereto; that the said land remained in the possession of the county until conveyed by it to the insurance company; and that, further, the plaintiff was estopped to maintain this action on account of the judgment which was affirmed on appeal in *Guilford v. Porter,* 170 N. C., 310, and reaffirmed in *S. c.,* 171 N. C., 356. No reply was filed. The court, upon the pleadings, entered judgment of nonsuit, and the plaintiff appealed.

R. C. Strudwick, Wm. P. Bynum, Manly, Hendren & Womble for plaintiff.

Wilson & Frazier, Brooks, Hines & Kelly for defendants.

CLARK, C. J. The defendants contend that the matter pleaded was a counterclaim, *McLean v. McDonald,* 173 N. C., 429; and that the plaintiff having filed no reply, the counterclaim was admitted to be true. But, passing that by, it appears that the plaintiff acquired his alleged easement, if at all, by prescription. The deed under which he claims is set out in the record, and it appears therefrom that the county of Guilford at the time of his purchase owned the tract adjoining him, styled "The hitching lot," and the said land continued in the possession of the county of Guilford until it was conveyed to the defendant insurance company in 1917. The plaintiff could not have acquired a prescription against the county. *Gates v. Hill,* 158 N. C., 584; C. S., 435.

It appears also that the alleyway in question was created by deed executed by the county to the Raleigh Real Estate and Trust Company, 20 May, 1904, and said deed contains the following provisions: "It being understood that the said alleyway shall not become a public thoroughfare, but shall be used only by the parties of the first and second parts and those holding through, by, or under them." The plaintiff by *mesne* conveyance acquired a title to a portion of the land conveyed by this deed to the Raleigh Real Estate and Trust Company, and the defendant insurance company has since acquired title to said land by a conveyance from the county.

The plaintiff is estopped by the judgment which was affirmed on appeal in *Guilford v. Porter,* 170 N. C., 310; *S. c.,* 171 N. C., 356, from claiming this easement. That action was brought to remove, as a cloud upon the title of the county, any and all claims of easement asserted by the plaintiff and all other adjoining landowners. In the complaint in that action the tract, over which the plaintiff is now claiming an easement, was described specifically by metes and bounds fully set out, which included this alleged alleyway, and the entire tract was alleged to be owned by the county of Guilford in fee simple, free and clear from all claims and easements of this plaintiff and all others. Final judgment was delivered in that action, and affirmed on appeal, holding that the county of Guilford had a right to convey the said premises to the insurance company in fee simple, free and clear from any claim or easement of the plaintiff and all others, and after said final judgment had been entered, the insurance company became the purchaser of said lands at a public sale.

The parties to that suit and this are the same. The subject-matter is the same—the same tract of land being in controversy; the nature of the two suits is the same, both being to decide the title to said tract of land and remove as a cloud from title all claims of easement. The prayer for relief is the same in both suits. A judgment is an estoppel not only as to all questions actually litigated, but as to all that were determined or necessarily involved in the decision of such litigation. *Coltrane v. Laughlin,* 157 N. C., 282; *Clothing Co. v. Hay,* 163 N. C., 495.

Substantially the same question here presented has been decided at this term in two other cases involving the same plea of estoppel by judgment and as to an easement in the same tract of land: *Barker and Sockwell v. Ins. Co., ante,* 267, and *Guilford v. Bynum, post,* 288. The judgment of nonsuit is

Affirmed.

C. N. HERNDON v. J. K. AUTRY.

(Filed 27 April, 1921.)

1. **Process — Summons — Service—Attachment—Judgment Set Aside—Motions—Justices of the Peace.**

   Where a justice's summons has been returned, "defendant not to be found in the county," and misinformation has been given the plaintiff that defendant has left the State, and it appears in the Superior Court on appeal that no process had been served on the defendant; that he was a resident of the State and had not concealed himself to avoid service of summons, etc.: *Held*, a warrant of attachment on the debtor's property situated in the county was properly vacated upon proper motion in the justice's court.

2. **Same—Notice—Parties.**

   The knowledge of the defendant that his property was advertised to be sold under a warrant of attachment in the action is not alone sufficient to make him a party to the action so as to conclude him by the judgment, it being required that he should have been, in accordance with the provisions of the statute, made a party thereto by proper service of process.

3. **Courts—Justices of the Peace—Judgments—Appeal—Process—Service.**

   Where the defendant has not properly been served with summons according to the provisions of the statutes, it is not required that he appeal within fifteen days after notice of the rendition of a judgment in the court of a justice of the peace.

4. **Appeal and Error — Judgments — Attachment—Sales—Purchasers—Motions—Void Judgments.**

   Where a judgment of a justice of the peace has been set aside after the sale of the defendant's property in attachment, the plaintiff may not complain that in setting aside the sale the judgment undertook to protect the rights of purchasers thereat.

APPEAL by plaintiff from *Finley, J.*, at January Term, 1921, of GUILFORD.

Civil action for debt. All the material facts are set out in the judgment of the Superior Court, which follows:

"This cause coming on to be heard, and it appearing to the court that this action was begun on 31 December, 1919, before a justice of the peace of Guilford County, by the plaintiff making affidavit to obtain a warrant of attachment and issuing a summons against the defendant; that said summons was returned 'defendant not to be found in my county'; that said warrant of attachment was levied on the household and kitchen furniture of the defendant on 31 December, 1919; that at said time defendant was on a visit to his mother in another county in this State, and had left his property in Greensboro; that the defendant returned to his home in Greensboro on 6 January, 1920, and went to see the plaintiff, told him that he had moved to No. 201 North

Davie Street in Greensboro, and offered to pay plaintiff something on account; that on 12 January, 1920, the plaintiff made an affidavit to obtain an order for service by publication, no further search by an officer having been made; that on 9 February, 1920, judgment was rendered by the said justice of the peace against the defendant, and on 6 March, 1920, the attached property of the defendant was sold under execution; that the proceeds of said sale were applied to the satisfaction of plaintiff's judgment and costs, and the surplus paid into said justice's court; that about 6 April, 1920, the defendant's attorneys served notice upon plaintiff that at a certain time they would enter a special appearance before said justice of the peace and move to vacate and set aside the judgment and warrant of attachment herein; that thereupon the justice of the peace gave judgment vacating and setting aside said warrant of attachment and requiring the plaintiff to pay into the court money that he had received by reason of the judgment originally rendered: and being requested by the plaintiff to make certain findings of fact, the court finds and declares the facts to be as follows:

"1. That the defendant on 31 December, 1919, and at all times thereafter was a citizen and resident of North Carolina, and was in the State of North Carolina on said date and at all times from said 31 December, 1919, until and after 9 March, 1920.

"2. That no process has ever been served upon defendant in this action.

"3. That the defendant did not conceal himself to avoid the service of summons in this action.

"4. That summons was regularly issued and returned by the sheriff, 'defendant not to be found in my county.'

"5. That the plaintiff made inquiry for the defendant and was told that he had left the State.

"6. That while defendant saw plaintiff before judgment was rendered and while service was being obtained by publication, plaintiff told defendant that the action was pending, and told him when the sale was to be held.

"7. That defendant was justly indebted to plaintiff in the amount of the judgment, and offers no proof, and does not contend that he (defendant) has any meritorious defense to the judgment.

"8. That defendant knew of the pending action, the attachment of his property, and the proposed sale some time before judgment or the sale of the property.

"9. That the funds (or a part of them) derived from the sale were applied to the judgment before defendant entered the 'special appearance.'

"10. That defendant did not appeal from the justice's judgment within fifteen days from notice of its rendition.

"Now, therefore, the judgment of the justice of the peace vacating and setting aside said warrant of attachment and requiring the plaintiff to pay into the court of the said justice of the peace all money that he has received from the proceeds of the sale under execution upon his original judgment herein is hereby affirmed in all respects, except that said judgment shall not prejudice the rights of purchasers for value without notice at said execution sale had upon the original judgment of the justice of the peace.

"February 5, 1921. T. B. FINLEY,
Judge Presiding."

To the foregoing judgment, plaintiff excepted and appealed.

C. R. Wharton and Brooks, Hines & Kelly for plaintiff.
Fentress & Jerome for defendant.

STACY, J. At the request of the plaintiff, and without objection, the court finds as a fact that the defendant was and is a resident of North Carolina; that he did not conceal himself to avoid service of summons, and that no process has ever been served upon him in this cause. Therefore the original judgment entered by the justice of the peace should have been set aside and the warrant of attachment vacated upon proper motion. *Lumber Co. v. Buhmann,* 160 N. C., 385; *Rackley v. Roberts,* 147 N. C., 201; *Carter v. Rountree,* 109 N. C., 29.

The fact that defendant knew this action was pending and that his property had been attached and was advertised for sale was not sufficient to make him a party so as to conclude him by the judgment. *McKee v. Angel,* 90 N. C., 60. It has been held with us that service of process, where not waived, must be made in accordance with the requirements of the statute in order to be binding. *Allen v. Strickland,* 100 N. C., 225. Nor do we think the defendant is precluded from moving before the justice by his failure to appeal from the judgment within fifteen days after notice of its rendition. *Lowman v. Ballard,* 168 N. C., 16. This might have been otherwise had the proceedings been regular and proper service obtained. *Thompson v. Notion Co.,* 160 N. C., 519.

The last paragraph of the judgment undertakes to protect the rights of the purchaser at the execution sale. This provision affords no ground to the plaintiff for objection, and the defendant had not appealed. *McDonald v. Hoffman,* 153 N. C., 254; *Harrison v. Hargrove,* 120 N. C., 96.

Upon the record, we think the judgment of the Superior Court should be upheld.

Affirmed.

AMERICAN FERTILIZING COMPANY v. D. J. THOMAS.

(Filed 27 April, 1921.)

1. Contracts — Vendor and Purchaser—Fertilizer—Agricultural Department—Analysis—Statutes—Damages.

A contract for the sale of fertilizer, specifying that the customer could only recover the difference between the contract price and the actual value of the goods in case of deficient analysis, to be determined by the State Agricultural Department from samples furnished by the customer, which analysis shall be conclusive as the best and only test, both by the statute and the contract, excludes parol evidence as to the effect the fertilizer had upon the crop grown upon the land, or as to the fertilizer containing an injurious element which the analysis and certificate made by the State Chemist expressly excluded. C. S., 4690 *et seq.*

2. Same—Contractual Rights.

Under the provisions of C. S., 4697, that the analysis of the State Agricultural Department shall be *prima facie* proof that the fertilizer was of the value and constituency shown by his analysis, "but that nothing in this article shall impair the right of contract," leaves it open for the parties to make their own terms by contract as to damages to the crop to be grown upon the lands, but parol evidence to show damage to crops is properly excluded when the parties by their contract have expressly agreed that the analysis of the State Chemist shall be the only test as to the quality of the fertilizer, and it has been thereby ascertained that the fertilizer furnished was in accordance with the contract.

3. Same—Evidence—Fraud.

Where it appears from the contract of sale of fertilizer that the vendor's warranty was that the goods should come up to the analysis upon the bags, and any deficiency should be determined by the analysis of the State Chemist under our statute, which should be conclusive as to damages claimed by the purchasers, and by this test the fertilizer has been found to be free from borax or other matter deleterious to crops, parol evidence tending to show that the fertilizer furnished did contain borax from the appearance or condition of the crop, is properly excluded upon an allegation of fraud, whether it comes from expert witnesses or others, as the analysis, under the agreement of the parties, is conclusive as to the ingredients of the fertilizer, and as to the recovery of damages to the crop it is a bar. C. S., 4690 *et seq.*

APPEAL by defendant from *Ray, J.*, at the February Term, 1921, of MOORE.

This action was brought by the plaintiff to recover the price of fertilizer goods sold and delivered by the plaintiff to the defendant in March, 1919, under a contract previously made.

The defendant admitted in his answer that he made the contract, and that "Exhibit A" attached to the complaint is a true copy thereof.

The plaintiff alleged that it delivered to defendant, under the terms of said contract, fertilizer to the value of $2,547.46, nearly all of the fertilizers being bone and Peruvian C. S. M. (cottonseed meal), 8-2-2 goods—that is to say, the guaranteed analysis appearing on the bags was 8 per cent available phosphoric acid, 2 per cent ammonia (equivalent to 1.65 per cent nitrogen), and 2 per cent potash.

The defendant admitted in his answer that the plaintiff delivered the quantities set out in the exhibit attached to the complaint, but denied that the goods delivered were according to contract, and alleged that they were worthless and contained borax and other harmful ingredients, and denied that he owed the plaintiff anything, admitting, however, that he had paid plaintiff nothing.

Defendant then set up a cause of action or counterclaim for damages for results from use, alleging that the plaintiff wrongfully and fraudulently included borax and other harmful ingredients in the fertilizers sold and delivered to him, and that he used a part of them on his crops of corn, cotton, and tobacco, and that he was damaged thereby $1,500.

The plaintiff replied to the counterclaim and denied the allegations of the answer as to the presence of borax or other harmful ingredients, and for further reply alleged: "That samples were drawn from said fertilizers sold and delivered by plaintiff to the defendant, and known as 'American Bone and Peruvian C. S. M.,' and which defendant claims had done the damage to his crops, and said samples were submitted to the State Chemist for analysis as provided by law, and were duly analyzed by him, at the request of the defendant, a copy of said certificate of analysis by the State Chemist being attached: and as appears therefrom the result of the analysis was that the value of the guaranteed ingredients was equivalent to $38.05 per ton, whereas the ingredients found by analysis were equivalent to $39.20 per ton, and that said analysis showed no borax or other deleterious substances, and the plaintiff is advised that a copy of said analysis was furnished to the defendant, and that at the request of defendant the State Chemist made a special analysis with a view to ascertain whether said fertilizer contained borax as claimed by the defendant, and that the State Chemist, under date of 15 July, 1919, wrote to the defendant as follows: 'We have made examination of the sample of fertilizers, the American Bone and Peruvian Cottonseed Meal, manufactured by American Fertilizing Company of Norfolk, our number 4211, sent in by you, for borax and do not find borax to be present.' "

The plaintiff also pleaded as a bar to recovery by the defendant of any damages the written contract between the parties, and especially paragraph 10 thereof, and the provisions of ch. 143, Public Laws 1917, as amended by ch. 120, Public Laws 1919. These acts are brought forward as sections 4690 to 4703 of Consolidated Statutes.

The plaintiff offered in evidence the contract between the parties, being "Exhibit A" attached to the complaint, which is as follows:

"It is further agreed that all deliveries under this contract are made with guaranty only of analysis on the sack, and not of results from use of said fertilizers or otherwise; and before using these fertilizers samples should be drawn and submitted to the State Chemist (or other authorized State official) for analysis as provided by the law of the customer's State, and if any claim shall be made for inferiority or deficient analysis, the certificate of analysis by the State Chemist (or other authorized State official) or his oral evidence shall be the best and only competent evidence of the contents of the goods, and shall be conclusive. If it shall appear from the said certificate or test that the goods do not come up to the guaranteed analysis, then the customer shall be entitled to recover the difference between the contract price and the actual value of the goods, as shown by the analysis made as above provided, which difference shall be ascertained, fixed and determined by the State Chemist (or other authorized State official); and no other damage shall be recoverable for deficient analysis or inferiority; provided, if damages for defective analysis or inferiority shall have been, or shall be assessed and paid as provided under State statute, then no other or further damage shall be collectible under the contract. A failure to draw this sample and submit it to the State Chemist (or other authorized State official), as above provided, shall be a full waiver on the customer's part of any claim for deficient analysis or inferiority hereunder. As soon as these fertilizers are received the customer shall examine them, and in case of any shortage in weight or count, error in tagging or other objection to the goods, the customer shall notify the company within ten days, giving the company opportunity to make inspection and correction before the fertilizers are used, otherwise any claim for damage under this analysis, as above stated, is hereby waived; and it is further agreed that the company shall not be liable for or required to make good to the customer any deficiency or claim for deficiency made or presented by any person purchasing from the customer."

The plaintiff next offered in evidence a verified itemized account of the goods sold and delivered, and also offered in evidence the certificate of analysis by the State Chemist, attested by the seal of the Department of Agriculture, of a sample of the fertilizers drawn from the lot in the hands of the defendant, which is as follows:

The official sealed sample of fertilizer received from the Commissioner of Agriculture has been analyzed, with the results as stated below:

The fertilizer proves to be: Name—American Bone and Peruvian C. S. M.

Manufactured by American Fertilizer Company. Address, Norfolk, Virginia.

Drawn from lot in hands of D. J. Thomas, Carthage, N. C. (R. F. D. No. 2).

The guaranteed percentage appearing on bags are: Available Phosphoric Acid, 8 per cent; Nitrogen, 1.65 per cent; Potash, 2 per cent.

Result of Analysis

Available Phosphoric Acid, 8.80 (including Soluble and Reverted Phosphoric Acid).

Nitrogen, 1.65.

Potash, Actual K. O. Soluble in Water, 1.96.

Note.—Does not contain Borax.

The relative value of the guaranteed ingredients at the factory per ton of two thousand pounds is equivalent to $38.05. The relative value of the ingredients found by analysis, per ton of two thousand pounds, is equivalent to $39.20, using in each case the following figures: Available Phosphoric Acid, 7 cents per lb.; Nitrogen, 45 cents per lb.; and Potash, 30 cents per lb. These figures are based on the wholesale prices of the fertilizers or fertilizer materials (bagged) at factory.

The guaranteed percentages were: available phosphoric acid, 8; nitrogen, 1.65 per cent (equivalent 2 per cent ammonia); 2 per cent potash. The analysis showed available phosphoric acid, 8.80; nitrogen, 1.65; potash, 1.96. No borax. The value of the guaranteed ingredients was equivalent to $38.05, while the value of ingredients found by analysis was $39.20. These figures are based on the wholesale prices of the materials at factory, as required by C. S., 4695. In other words, the fertilizers delivered had $1.15 in value of plant food per ton more than the goods contracted for, and yet the defendant alleged the goods were worthless. The acid phosphate was above the guarantee .80 per cent; the nitrogen or ammonia was just in accordance with the guarantee, while the potash was .04 per cent below the guarantee. Experience has shown that it is impossible in mixing fertilizer materials always to have the ingredients in exactly the guaranteed percentages, and the statute provides that if the deficiency is five per cent below the guaranteed value in plant food the manufacturer is penalized, and it is further provided that "Any excess of any ingredient above the guarantee shall not be credited to the deficiency of any other ingredient if the deficiency is more than 15 per cent." C. S., 4695. The deficiency of potash was much less than 15 per cent; in fact only 2 per cent. At the time the sample was drawn from these 8-2-2 goods in the hands of the defendant he was claiming that they contained borax, and the analysis was made at the request of the defendant for the purpose of ascertaining whether borax was in fact present, as the defendant claimed, and this accounts for the following notation on the analysis: "Does not contain borax."

All of the evidence which the defendant offered at the trial was for the purpose of showing that these 8-2-2 goods, from which the sample had been drawn and analyzed, did contain borax. The defendant himself testified that he had used these 8-2-2 goods, purchased from the plaintiff, on his crops of corn, cotton, and tobacco, and then he offered to show that he made poor crops, and how the plants were affected. This was excluded. The defendant next proposed to show by a number of his neighbors, who had purchased from him the 8-2-2 goods of plaintiff, and who had used this fertilizer on their crops, that they made poor crops. This was excluded. The defendant next propounded to Professor Wolf, a botanist connected with the Experiment Station, a hypothetical question purporting to be based upon the excluded testimony, as to the condition of the crops where the 8-2-2 goods were used, and asked him, if the jury should find the facts to be as set forth, whether he had an opinion satisfactory to himself as to what caused this condition of the plants. The witness would have answered that these conditions were the symptoms of injury by borax. This is all the evidence the defendant offered.

It thus appears that all of the proffered testimony on the part of the defendant was directed to showing that the 8-2-2 goods contained borax. These were the goods the plaintiff sold the defendant, and which the defendant had caused to be officially analyzed by the State Chemist for the express purpose of determining whether they did, in fact, contain borax, and this analysis showed that the goods did not contain borax. The court excluded this proposed testimony in view of the statute applicable and the admitted contract between the parties and the decided cases. The statute provides as follows: "The Department of Agriculture shall have the power, at all times and at all places, to have collected by its inspector samples of any commercial fertilizer or fertilizer material offered for sale in the State, and have the same analyzed; and such samples shall be taken from at least 10 per cent of the lot from which they may be selected: *Provided*, that no sample shall be drawn from less than ten bags of any one brand." The statute then provides in detail for the drawing of samples, and concludes as follows: "In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the State Chemist and attested with the seal of the Department of Agriculture, setting forth the analysis made by the State Chemist of any sample of said fertilizer drawn under the provisions of this article, and analyzed by him under the provisions of the same, shall be *prima facie* proof that the fertilizer was of the value and constituency shown by his said analysis; and the said certificate of the State Chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the Department of Agriculture in accordance with the regulations which it may adopt for the carrying out of this article: *Provided,* that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods; but nothing in this article shall impair the right of contract." C. S., Vol. II, sec. 4697. This statute was passed in 1917 and slightly amended in 1919 as to the method of drawing samples, and the statute expressly provides that "Nothing in this article shall impair the right of contract." Acting under the provisions of this statute, the plaintiff and defendant entered into the contract set out above.

J. Crawford Biggs for plaintiff.

H. F. Seawell, R. L. Burns, L. B. Clegg, and U. L. Spence for defendant.

WALKER, J., after stating the material facts: It will be observed that the contract provides that "The certificate of analysis by the State Chemist, or his oral evidence, shall be the best and only competent evidence of the contents of the goods, and shall be conclusive." The certificate shows affirmatively that the contents of the goods are phosphoric acid 8.80, nitrogen 1.65, and potash 1.96, and that they do not contain borax. The parties have agreed that the analysis by the State Chemist should be the best and only competent evidence of the contents of the goods, and conclusive; and it would seem that the evidence which the defendant proposed to offer to show that the goods contained borax or, in other words, the contents of the goods were different from that shown by the analysis, was clearly incompetent.

A chemical analysis by a disinterested competent expert, such as the State Chemist, is the best method of ascertaining the contents of fertilizers, and infinitely better than the method proposed by the defendant.

"The best evidence is the analysis by the Agricultural Department," said *Clark, C. J.*, in *Fertilizer Works v. McLawhorn*, 158 N. C., 274. In *Carter v. McGill*, 168 N. C., 507, the Court said: "The seller and the buyer of fertilizers can protect themselves by a proper warranty at the time of purchase if they see fit to do so. The seller may restrict it, while the buyer may require that it be enlarged, according as their interest may dictate. Unless they do so, they must abide by the contract as made by them." This was said in a case where the seller had not protected himself, as in the case at bar.

When *Carter v. McGill, supra*, was before the Court on a rehearing, reported in 171 N. C., 775, the Court said: "It is proper, in this connection, to suggest that the plaintiff, and others in the fertilizer trade similarly situated, can protect themselves against too great a hazard in respect to the loss of crops by a provision in their contracts to the effect that they are not to be liable for any results from the use of the fertilizer, or for any loss of crops, as was done in the case of the contract which was the subject of the controversy between the parties in *Guano Co. v. Livestock Co.*, 168 N. C., 442, where we held such a stipulation to be valid."

Our attention has been called to a case recently decided in South Carolina, *Germofert v. Cathcart*, 88 S. E., 535, in which, upon careful examination, we find the Court construed a contract almost identical in language with the one which was under consideration in *Guano Co. v. Livestock Co.*, 168 N. C., 442, and it held, as we did in the latter case, that the express warranty, and the restrictive clause therein as to nonliability for results, excluded the evidence as to failure of crops. See, also, *Allen v. Young*, 62 Ga., 617, which was cited for that position in *Guano Co. v. Livestock Co., supra*, at p. 448. In the *Germofert case, supra*, the Court said that "the defendant cannot be allowed to avail himself of a method of defense that he has agreed not to use." And again, "the defendant had agreed not to 'hold payee responsible for practical results of said fertilizer on crops.' The evidence and the charge responding to it was in direct violation of the agreement." And so we said substantially in *Guano Co. v. Livestock Co., supra*, the rule of damages having been fixed by the terms of the contract itself.

While cases must be decided according to the rules of law, as well stated by *Justice Hoke* in *Tomlinson v. Morgan*, 166 N. C., 557, the strict enforcement of the rule may in some cases bear harshly upon a litigant, and it might do so in this class of cases. It is therefore expedient and proper that the dealer should be allowed to shield himself against possible injustice by adequate provision in the contract of sale. If he acts in good faith, he should not be unfairly dealt with; and it is not unusual, as the cases will show, to insert such a clause in contracts of this kind. In *Guano Co. v. Livestock Co.,* 168 N. C., 442, the contract provided that "the fertilizer is furnished with the guarantee of analysis printed on the sack, but not of results from its use," and the Court held this was a valid stipulation and that the guano company could not be held liable for any results from the use of the fertilizer, and the jury could consider the evidence as to the effect of the fertilizer on the crops only for the purpose of showing the absence of the guaranteed ingredients or the represented quantities of each, and not at all for the purpose of assessing damages either directly or indirectly, because of any loss or diminution of the crops, as the measure of damages depends upon quite a different principle. The extent of the recovery must be restricted to the difference, not necessarily between the price and the value of the article purchased, but to the difference between the article delivered under the contract of warranty and its value or market price if it had been such as it was warranted to be. The Court then said: "We have mentioned this subject for the purpose of showing that no part of the recovery, under this contract, should be assessed for the failure of crops, as there is an express stipulation that plaintiff should not be held liable for any results from the use of the fertilizer." *Guano Co. v. Livestock Co., supra,* at pp. 450-1. This was said in a case where the stipulation was that the fertilizer company only guaranteed the analysis on the bags, and was not liable for results from use, but there was no stipulation, as in the case at bar, that the analysis should be the best, only, and conclusive evidence as to the contents of the goods. Nor was there a provision that when the goods were analyzed the State Chemist should determine the relative value of the guaranteed ingredients and those found on analysis, as in this case. The State Chemist did analyze the goods and found that those delivered exceeded in value the guaranteed goods sold by $1.15 per ton.

The recent case of *Fertilizer Works v. Aiken,* 175 N. C., 398, seems to be decisive of this case. There the earlier cases are reviewed, and the Court held that where an express warranty guaranteeing a specified analysis, but not as to results on the crops, will protect the manufacturer or vendor from damages claimed for loss or diminution of crops, because the goods were not fitted for the purposes for which they were bought, this being a warranty ordinarily implied in such contracts, citing *Carter v. McGill,* 168 N. C., 507 (*S. c.,* 171 N. C., 775); *Guano Co. v. Livestock Co.,* 168 N. C., 443; *Germofert v. Cathcart,* 104 S. C., 125; *Allen v. Young,* 62 Ga., 617.

In the *Aiken case,* the fertilizer company sued for the fertilizers sold under a contract in the following terms: "I hereby acknowledge I have received and used the above fertilizers, without any guarantee on the part of Armour Fertilizer Works or its agents as to results from its use, and which have been inspected, tagged and branded under and in accordance with the laws of this State; and I hereby waive all claims, damages, and penalties in case of deficiency, except claim for the actual commercial value of deficiency when, and only when, ascertained and determined by the State Chemist from samples taken in the presence of seller or seller's authorized representative, from fertilizers for which this note is given." The defendant alleged in his answer that the fertilizer was utterly worthless. In referring to the contract, this Court said: "In this contract it will be noted that the stipulations in protection of the vendor go much beyond those appearing in the case just referred to. (168 N. C., 443.) In its terms and purpose it is broad enough to exclude, and does exclude, any and all evidence as to the effect of the fertilizer on the crops, the agreement being as shown, that the purchaser waives all claims except those for the 'commercial value of the deficiency' from the stipulated standard, and this only when ascertained and determined by the State Chemist from samples taken from the fertilizers sold and in the presence of the seller or his authorized agent. We are of opinion that such a stipulation is in every way a reasonable one, well calculated to promote and insure fair and safe dealing with this important matter, and not only not opposed to any public policy prevailing with us, but the same is in accord with direct suggestion of this Court in *Carter v. McGill, supra,* and fully recognized and approved in our latest legislation on the subject, Laws 1917, ch. 143."

The contract in this case is, in its terms, very similar to the one in the *Aiken case.* It provides, among other things: "If any claim shall be made for inferiority or deficient analysis, the certificate of analysis by the State Chemist shall be the best and only competent evidence of the contents of the goods, and shall be conclusive. If it shall appear from the said certificate that the goods do not come up to the guaranteed analysis, then the customer shall be entitled to receive the difference between the contract price and the actual value of the goods as shown by the analysis, which difference shall be ascertained by the State Chemist, and no other damage shall be recoverable for deficient analysis or inferiority."

The Court, referring to the statute which had just been passed, Laws 1917, ch. 143 (now C. S., 4690 to 4703, as amended in 1919, as to method of sampling), said: "The statute in question, repealing sections 3945 to 3956 of Revisal, inclusive, makes elaborate and minute provision with the view of insuring a correct analysis of these important commodities and in protection both of the manufacturer and vendor and of the purchaser and consumer; directs the employment of sufficient chemists and assistants; provides for an analysis at the instance of the purchaser, or by its own agents when necessary; provides further, that samples for the purpose shall be taken always in the presence of the agent, seller, or dealer, or some representative of the manufacturers, or if none of these can be present, or if they refuse to act, then in the presence of two disinterested witnesses, etc. That no suit for damages shall be brought for results in use except after chemical analysis showing deficiency of ingredients unless the dealer has been selling goods that are outlawed by the statute, or had offered for sale during the season dishonest or fraudulent goods. Having thus dealt very fully with the subject, recognizing as sound the principle of selecting the samples in the presence of the manufacturer or dealer, section 7 of the act concludes with the proviso that 'nothing in said act shall impair the right of contract,' showing the clear intent and purpose of the Legislature to allow to either party the privilege of making further stipulations in reasonable protection of their interests and in accord with established principles of law. In *Fertilizer Works v. McLawhorn,* 158 N. C., 274, decided intimation is given that this is the true public policy and the correct interpretation of our former statute on the subject, and undoubtedly it should prevail under the present law." The Court further said, with reference to that language, that it was much stronger for the protection of the manufacturer than is that used in the case of *Guano Co. v. Livestock Co., supra,* and we now say that the language of the contract in this case is, if anything, much more restrictive of the customer's right to question the truth and accuracy of the statements contained in the official (and also in this case contractual) analysis of the State Chemist. The parties were free to enter into a contract with regard to the matter, and to bind, and even conclude, themselves, and each one of them, by its stipulations. They made for themselves in their dealings a contractual rule of evidence, each being at arms-length with the other, there was nothing in it contrary to public policy, and therefore they must be held as subject to its terms, and their rights and obligations must be determined accordingly.

But the defendant contends that there was fraud, in that the plaintiff had mixed borax with the other ingredients of the fertilizer, and his crops were damaged thereby, as it was the opinion of his expert witness, who was a botanist, that borax was injurious to the crops, and their appearance indicated symptoms showing that they had been poisoned by borax. But the full and complete answer to all of this contention is that it has been shown by the analysis of the State Chemist (the party to whom the law, and the parties by their contract, referred the matter for a final decision, which should bind them "conclusively") that there was no borax in the fertilizer. There is no allegation or suggestion that there was any fraud practiced by the chemist in making his decision or award, or even by the plaintiff in preventing an honest report, but, on the contrary, and as far as appears, the certificate of the analysis was fairly and honestly made, without even any hint at fraud or collusion. We do not say that fraud would not be sufficient to set aside a false certificate of the facts as to the value and potency of the fertilizer, but it has not been shown in this case, or attempted to be shown. The defendant himself requested the State Chemist to make the analysis, and, besides, he solemnly agreed that it should bind and conclude him. If he had any doubt of its correctness, or even if he did not have such doubt, and wished to be assured of its correctness, he could then have retained another chemist of his own choice and possessing greater skill and expertness, if he thus appraised him. In the absence of such a showing of fraud, the certificate must stand as conclusive evidence that the analysis is correct. It certainly cannot be impeached by the opinion even of an expert botanist that the appearance of the crop indicated symptoms of borax poisoning. If we should hold otherwise, it would impair very seriously the efficacy of the statute, and annul the contract of the parties, the execution of which is not assailed for fraud.

There is no sufficient evidence of fraud for the jury. The most that can be said in behalf of defendant's position is that the opinion of the botanist formed by a mere inspection of the crop as to the presence of borax in the fertilizer is too uncertain, conjectural, and unreliable to be received as proof, and can hardly be of the least probative force if admitted, when considered in the light of the statute and the stipulations of the parties, by which it has been excluded, as unfit for the purpose of establishing the alleged fact of fraud. It has been agreed, and the law so declares, that the only evidence shall be the certificate of the analysis as made by the State Chemist, and that shows "conclusively" that there was no borax in the formula by which the fertilizer was made. The report of the analysis by the chemist, both impliedly and expressly, declares that there was no borax or other deleterious substance in the fertilizer, and, as we have said, there is nothing to impeach that finding for fraud or other reason, therefore the opinion of the botanist must be discarded. If we should admit such evidence, instead of the certificate being an absolute protection for the manufacturer or dealer in fertilizers, as we have said it was intended to be by the law and the contract, it would be little more than a delusion and a snare.

In the case of *Germofert Mfg. Co. v. Cathcart*, 88 S. E. (S. C.), 535, the Court passes upon this very question in the following language: "There was no attempt made to analyze the fertilizer. Ample provision is made by law to secure a reliable analysis. The defendant had agreed that the test of value should be made by analysis. No man can look at a crop (dead or alive) and tell what per cent of ammonia or potash or other substance it contained. They did not pretend to do so. The defendant had agreed not to 'hold payees responsible for practical results of said fertilizer on crops.' This evidence, and the charge responding to it, was in direct violation of the agreement. It cannot be said that test of value by analysis is an unlawful contract, because the statutes recognize a test by analysis. The defendant signed a perfectly lawful contract, with ample protection afforded by law. The defendant cannot refuse to adopt the protection approved by law and offered by his contract and be allowed to avail himself of a method of defense that he has agreed not to use. Some substances may kill because they are true to analysis." There was a dissenting opinion in the case, but we most respectfully think that it completely missed the real question in that case, and is based entirely upon a misconception of the point involved. The majority opinion stated the point and the pertinent principle correctly, placing the decision upon the clause discharging the seller from all responsibility for "results upon the crops."

We must hold, therefore, that there is no reason shown why the judgment of the Superior Court should be disturbed.

No error.

M. G. DALRYMPLE v. T. W. COLE ET AL.

(Filed 27 April, 1921.)

1. Appeal and Error—Issues—Assignment of Error.

Where the refusal of the trial judge to submit issues tendered is excepted to, these issues should be set out in the assignment of error for them to be considered on appeal.

2. Issues—Forms—Matters in Controversy—Appeal and Error.

The form of the issues is a matter largely in the discretion of the trial judge, and those submitted by him will be sustained on appeal if they were sufficient to present all matters material to the controversy.

3. Judgments—Pleadings—Lis Pendens—Estoppel.

The pleadings filed in a suit to enforce specific performance of the vendor's contract to convey lands, describing the lands, has the effect of "*lis pendens*" on a subsequent purchaser, giving him constructive notice at least; and thereupon he should intervene and assert whatever title he may claim, or he will be concluded by the judgment.

4. Same—Supreme Court—Decisions in Other Actions.

Where a purchaser of lands is affected with notice of "*lis pendens*" in a suit brought to recover the lands, he is estopped by the judgment

therein. The principle announced in *Mayho v. Cotton*, 69 N. C., 289, is not called in question under the facts in the case at bar.

APPEAL by defendants C. M. Reeves *et al.* from *McElroy, J.,* at December Term, 1920, of MOORE.

This suit is to enforce specific performance of an option to convey land. The judgment on demurrer against the plaintiff by *Judge Cooke* at April Term, 1911, was reversed on appeal in this case, 156 N. C., 353; on appeal from *Judge Adams* at September Term, 1914, the judgment was affirmed with modifications asked by the plaintiff, 170 N. C., 102. New parties were ordered to be brought in pursuant to the ruling of the Supreme Court, and the order of *Judge Webb* thereon was made, and amended pleadings were filed, and the judgment was again affirmed. On the present trial before *Judge McElroy* the verdict of the jury finds, and the answer of the appealing defendants admits, that they became purchasers of the land in controversy (embraced in the option to the plaintiff, specific performance of which was decreed, from the original defendant, T. W. Cole, and his wife) after the bringing of the action and after filing the original complaint. The verdict of the jury further determined the amount due to the various mortgagees and lienors of the original defendant, T. W. Cole, and specific performance was decreed in favor of the plaintiff against all the new defendants, protecting the rights of the parties according to the findings of the jury. From the judgment thereon the defendants C. M. Reeves, K. R. Hoyle, Hugh Palmer, and R. P. Coble appealed.

Geo. W. McNeill and U. L. Spence for plaintiff.
K. R. Hoyle and A. A. F. Seawell for defendants.

CLARK, C. J. The defendants except for refusal to submit the issues tendered by them. These issues are not set out in the assignments of error, and therefore, upon the decisions of this Court, might be disregarded. We will say, however, that the form of the issues is a matter largely in the discretion of the court, and will be sustained if the issues submitted are sufficient to present all matters material to the controversy. Upon reference to the issues submitted by his Honor, twenty-five in number, we think that there was most ample opportunity to present every contention of the defendants, and that they were in fact fully presented on the trial. The second, fourth, and fifth exceptions are to refusal of nonsuit, and the sixth exception is a formal one to the judgment as signed. The only remaining assignment of error is the third, "To exclusion of evidence offered to prove that the money tendered by the plaintiff to the original defendant, T. W. Cole, pursuant to the contract introduced in the evidence, was not the money of the plaintiff but the money of another party."

The appellants alleged in their answer that the option, specific performance of which was decreed in favor of the plaintiff, was void as to appellants for the reason that "There was at the date of the execution of the said contract, docketed and alive and unpaid in Moore County a judgment in favor of Henry Williamson against T. W. Cole, the original defendant, for $65," in addition to the liens set up in the original complaint.

A careful consideration of the record and the contention of the parties presents but two questions for decision by this Court:

1. Did the existence of the docketed judgment of Henry Williamson for $65 at the time of the execution of option contract render it void as to the appellants?

2. Are the appellants estopped by the proceedings in this action against the original defendant, T. W. Cole, and the judgment rendered therein against him and the other defendants?

The first question was decided in favor of the plaintiff in *Dalrymple v. Cole,* 170 N. C., 102, and is the law of this case, and the appellants who bought into this action after it was brought and after the filing of the original complaint are estopped thereby. The defendants rely upon *Hall v. Dixon,* 174 N. C., 319, as having overruled that case, but in *Hall v. Dixon* it was held otherwise. But even if it had done so it could not have affected the appellants in this case, for the decision in 170 N. C. is the law of this case and binding upon the appellants who came into the case after the complaint herein was filed. The appellants had constructive knowledge, at least, of this action pending against T. W. Cole, and are held to have had understanding of the consequences of an adverse decree against Cole in that action. It was their duty to intervene in that action and defend their rights, and having failed to do so, they must abide by the decree against Cole. They bought into this controversy. They cannot, as Mr. Spence well says, "Take two bites at a cherry," quoting *Pearson, C. J.,* in *Hamlin v. Tucker,* 72 N. C., 503. They had one while Cole was defending the action, and now they are seeking another.

In *Badger v. Daniel,* 77 N. C., 253, in which the writer of this opinion was of counsel, and in which this was the sole point decided, *Mr. Justice Rodman* says: "It is held on grounds of public policy that 'a purchase made of property in actual litigation, *pendente lite,* for a valuable consideration, and without any express notice or implied in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the decree of judgment in the suit,'" citing 1 Story Eq. Jur., sec. 405. That case has been held authority in numerous citations thereto set out in the Anno. Ed., and the same principle has been stated also in *Baird v. Baird,* 62 N. C., 317; *Daniel* *v. Hodges,* 87 N. C., 100; *Powell v. Dail,* 172 N. C., 261, and in many other cases. The matter is fully discussed by *Mr. Justice Allen* in the latter case. In *Collingwood v. Brown,* 106 N. C., 367, it was held that "When an action is brought in a county where the land is situate it is not necessary to file a formal *lis pendens,* the filing of the complaint, describing the property and stating the purpose of the action, being held sufficient." Adding that "There is but one rule of *lis pendens* in North Carolina, and the filing of the complaint brings into operation all the provisions of the statute." Indeed, the proposition that the appealing defendants are estopped by the former judgment in an action which had been brought and the complaint filed before they bought into the controversy is elementary law. The courts are not called upon to thrash over old straw, and the defendants, having had an opportunity to defend in this action prior to the judgment therein heretofore rendered, and not having done so, are estopped. "Not having spoken when they could have been heard, they should not speak now when they should keep silent."

However, we are not to be understood as calling in question the authority of *Mayho v. Cotton,* 69 N. C., 289, and the numerous cases since then in approval thereof, which are cited in the annotations to that case in the Anno. Ed., and the many other cases since which have followed it, nor as questioning the accuracy of the two previous decisions in this case. Unless the homestead is "allotted and occupied" the conveyance without the joinder of wife is valid except as to the dower interest. Const., Art. X, sec. 8; C. S., 729.

No error.

COUNTY OF GUILFORD ET AL. AND JEFFERSON STANDARD LIFE INSURANCE COMPANY v. W. P. BYNUM ET AL.

(Filed 27 April, 1921.)

Judgments — Estoppel — Counties — Deeds and Conveyances — Public Squares—Adjoining Owners—Easements.

Where the right of the county to sell its entire courthouse square free from any claim of easement by adjoining owners of land has been put in issue and decided in the county's favor, and the judgment affirmed on appeal, the decision is conclusive between the same parties; nor is the question affected by the fact that the contract of the county to sell in the former action reserved unsold a strip alongside of the property of the adjoining owners, and the appeal in the present action is based upon a deed between the same parties to the same land for an additional consideration, without reserving such strip in the conveyance.

APPEAL by defendants from *Finley, J.,* at February Term, 1921, of GUILFORD.

The county of Guilford and the Jefferson Standard Life Insurance Company sue to clear a cloud from the title of the said company to the land purchased by it from its coplaintiff, the county of Guilford, said land being popularly known as "the old courthouse square." The insurance company alleges ownership of said land by virtue of the title heretofore construed in *Guilford v. Porter,* 170 N. C., 310; *S. c.,* 171 N. C., 356; that it is the owner in fee simple of the tract of land in question and has the right to erect buildings completely covering the said tract of land; that the claims of the other parties constitute a cloud upon the title of the said insurance company, and asks to have them declared and adjudged to be invalid. The court below held that the insurance company held an absolute title in fee simple, unencumbered by any easement or other claim, and the defendants appealed.

Wilson & Frazier and Brooks, Hines & Kelly for plaintiff.
R. W. Harrison, R. C. Strudwick, and S. L. Alderman for defendants.

CLARK, C. J. The sole question presented on this appeal is what is the force and effect of the judgment rendered between the same parties, 171 N. C., 356. In that case these defendants claimed an easement in all of the *locus in quo,* the entire courthouse square, by reason of the fact that they owned offices whose doors opened upon the square. In such former action the county had offered to convey the entire tract to the Jefferson Standard Life Insurance Company for the sum of $150,000, but in that offer they had excepted 18½ feet of the property next to the defendants' line, but alleged in the complaint that the county had the right to convey the entire property in fee simple, "unencumbered by any rights of the defendants or either of them." The defendants in that action denied the right of the county to sell the property at all, claiming an easement in the whole tract.

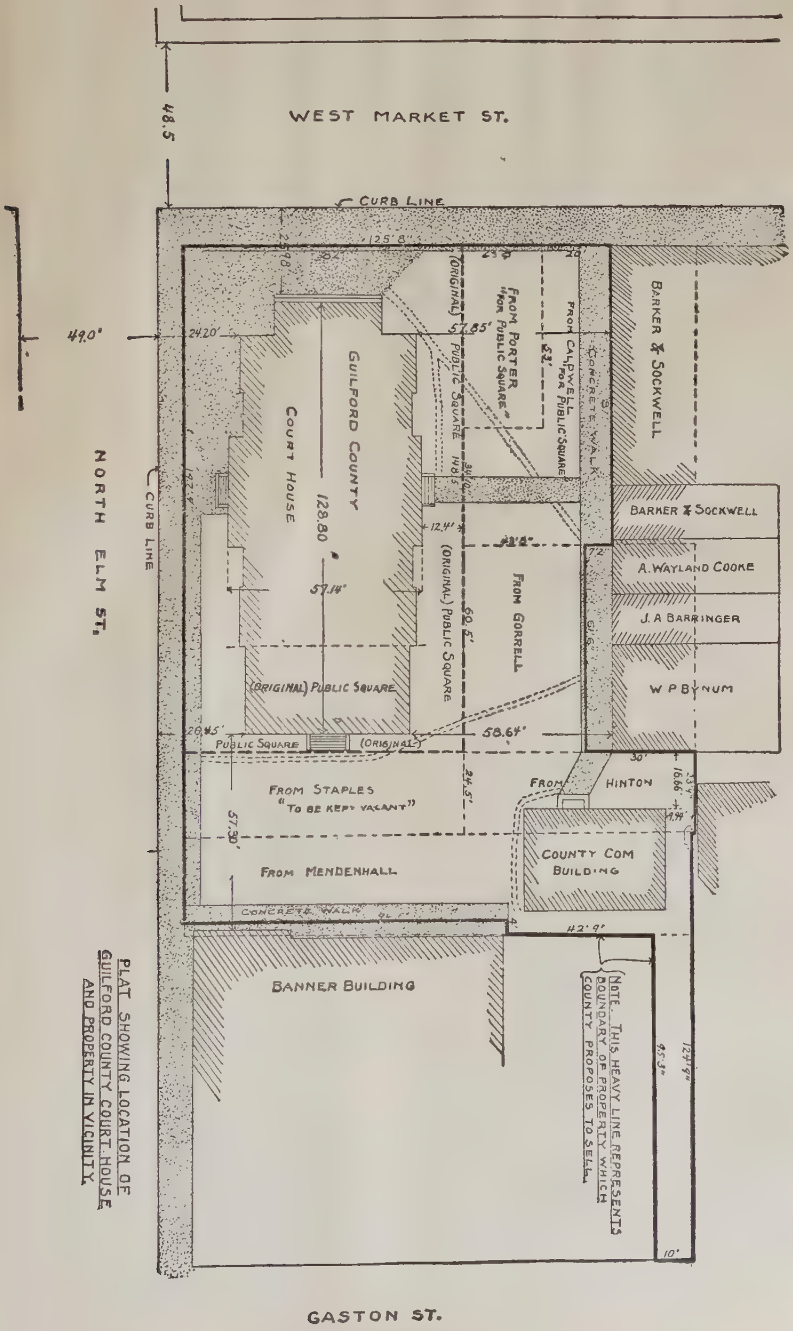
In that former case the court held that this property was owned by the county of Guilford in fee simple, free from any right, title, or easement whatever in the defendants or any of them. On this opinion going down the county offered to sell, and did sell and convey to the coplaintiff the entire property up to the boundary line of the defendants, "Free from any rights, title or easements" in the defendants or any of them—being the same defendants as in the present case—for the sum of $171,000.

In the decision in the former action the defendants claimed an easement in the property of the county on the ground that it was a public square, and as their offices and buildings faced on that ground they had an easement therein that it should never be sold or conveyed by the county without a release by them. The county replied, denying the said defendants had any interest whatever in said property, and the decision below, affirmed by this Court, sustained the above right of the county to the property up to the defendants' line, subject to no easement or encumbrance in their favor.

This was the issue in the case, and that matter is *res judicata* in this appeal.

The decision in *Guilford v. Porter,* 170 N. C., 310, reaffirmed in same case, 171 N. C., 356, did not call in question the familiar doctrine that when a tract is laid off into town lots, streets, and open squares the purchasers have a right to have abutting streets and squares kept open, nor did it question the ruling in *Southport v. Stanly,* 125 N. C., 464, that towns and counties could not sell real estate devoted to governmental purposes without legislative authority, but here there was such authority. What that case held was that the location of public buildings gave no easement to the adjoining lot-owners that would confer on them an easement to prohibit the county or town from changing the location of a public building. As was said in *Guilford v. Porter,* 170 N. C., 314: "An easement arises from the contract of the party. Otherwise, whenever a town, county, or the State shall purchase property for a public purpose it will become inalienable under penalty of paying the adjacent proprietors damages in case the public interests shall require a sale of the property." The adjacent owners have no more right to this than to prevent the removal of an adjoining store or residence that gives tone to the neighborhood.

It is true in the offer to sell then before the court, the county had proposed to sell to the life insurance company, reserving to itself, but not to the defendants, an 18½-foot strip on the western side, but asserting its absolute right to the entire lot. The defendants asserted that they had an easement to have the entire square retained by the county. After the adjudication in favor of the county of its absolute ownership of the entire courthouse square, free from any encumbrance or easement whatever on the part of the defendants, the county thereupon sold and conveyed, in accordance with that decision, up to its outward boundary for the sum of $171,000. The first offer to sell to the insurance company reserved to the county 18½ feet, but this was not a contract with the defendants and did not give them any rights. The controversy before the court put in question one single proposition, that is, the absolute title of the county to the entire square up to the defendants' boundary, free from any easement or encumbrance whatever. That was decided in favor of the county and cannot now be reopened. It was entirely a matter for the county and in no wise concerned the defendants that in the second offer to the Standard Life Insurance Company the county saw fit to sell its entire holding up to the defendants' line without any reservation.



NOTE. THIS HEAVY LINE REPRESENTS BOUNDARY OF PROPERTY WHICH COUNTY PROPOSES TO SELL.

PLAT SHOWING LOCATION OF GUILFORD COUNTY COURT HOUSE AND PROPERTY IN VICINITY.

The county, however, in its generosity, has reserved an alleyway of eight feet in the conveyance to the Jefferson Standard Life Insurance Company, giving an outlet nearly as convenient to North Elm Street. This, however, is a matter of grace. It was the defendants' misfortune that they had bought back lots, not facing on a street, and had assumed that because the county had built a courthouse upon this square that it would remain there always. This constituted no easement in the courthouse square in favor of the defendants. The judgment of the court below is

Affirmed.

FRANK H. MARSHALL, BY HIS NEXT FRIEND, v. INTERSTATE TELEPHONE AND TELEGRAPH COMPANY.

(Filed 27 April, 1921.)

1. **Evidence—Witnesses—Opinion Upon the Facts.**

The exception to the general rule, which admits the opinion of a witness upon the facts, has no application where the facts may be separately stated, and the testimony is the expression of the witness' opinion of the facts at issue for the jury to determine.

2. **Same—Appeal and Error—Dangerous Instrumentalities—Electricity—Employer and Employee.**

The plaintiff was employed by a telephone company as a lineman, and there was evidence tending to show that the lines of a power company, a different one, were strung upon the same line of poles, etc.; that the power company's lines at places were negligently and dangerously close to those of the telephone company, with improper insulation, and that the plaintiff's injury was caused by the high voltage of electricity on the wires of the power company communicated to the wires of the telephone company, in themselves harmless, while the intestate was engaged in the scope of his duties on his employer's wires: *Held*, the opinion of a witness that the place was not safe was improperly admitted, and constituted reversible error, the action being based on failure to provide safe place to work.

HOKE, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

APPEAL by defendants from *Allen, J.*, at the September Term, 1920, of DURHAM.

This is an action brought by the plaintiff, a minor, through his next friend, to recover damages for the loss of his arm and other injuries, resulting from the alleged negligence of the two defendants.

The plaintiff offered evidence tending to prove the following facts:

The plaintiff was nineteen years of age at the time of his injury in October, 1919. He was employed by the defendant, Interstate Telephone and Telegraph Company, in 1918 as general utility boy or apprentice lineman, at $2 per day, and had been climbing poles some four to six months prior to the injury, and was then getting $3 per day. He had been working for the defendant telephone company about fourteen months.

On 21 October, 1919, L. D. Darnell, four colored laborers, and plaintiff composed the crew of the defendant telephone company that was sent to Vickers Avenue, in the city of Durham, N. C., to string two new telephone wires down said avenue southwardly from Chapel Hill Street and along the west side of Vickers Avenue. Both of the defendants had poles and wires along the west side of said avenue, and at some places the wires were attached to the same poles and at others to separate poles. The poles of the telephone company were taller than the traction company poles, and the phone wires were above the power wires of the defendant traction company. About three or four poles southward from Chapel Hill Street, and in a line with said poles and wires, there was a sycamore tree as tall or taller than the highest poles and wires, with a large number of outspreading branches, through which the wires of both the defendants run and mix together through the branches of said tree, and in some instances are from four to six inches apart. The insulation was worn off of the electric power wires, which carry a voltage of 2,300, in several places in and near the sycamore tree. The distance between the cross-arms of the two companies are not uniform, but run from fourteen inches to two feet apart. At one place near where the plaintiff was injured the power or primary wires of the traction company are separated from the telephone company's wires only by the thickness of a piece of plank or board. The defendant traction company had two 2,300 voltage primary or power wires and one arc circuit, and the telephone company from forty to sixty wires running along this line. The telephone wires carry no voltage or electricity, and within themselves are not dangerous to handle.

When the crew arrived at Vickers Avenue for the purpose of stringing phone wires, plaintiff would climb one pole and Darnell the other, and the colored laborers would throw up the tie-ropes and play off the wire. When plaintiff had gone up the fifth pole, to which pole the wires of both companies are attached, and had passed the cross-arm carrying the wires of the traction company, and had dead-ended one of the new wires he was stringing, and with his spikes fastened in the pole, and with one hand holding iron brace, he had leaned back a little and was waiting for the tie-rope, with the other wire, to be thrown to him, when he was caught with an electric current, severely burning his hand and shoulder, and remained there until he was burned into unconsciousness, from thirty to forty minutes, and until the fire department came and took him down.

There was evidence on the part of the defendants in contradiction of much of the evidence of the plaintiff.

A witness for the plaintiff, who had examined the place of the injury, was asked the following question: .

"State whether or not the conditions as you found them over there of these wires were in a safe condition." To which question the defendants objected. Objection overruled, and defendants excepted.

The witness answered that they were not safe.

There were other exceptions taken by defendants not necessary to be stated.

There was a verdict and judgment for the plaintiff, and defendants appealed.

Brawley & Gantt for plaintiff.
Bryant & Brogden and W. L. Foushee for defendant.
Fuller, Reade & Fuller for telephone company.

ALLEN, J. The general rule is that the opinion of a witness is not competent evidence; he must state facts, and let the jury form the opinion. *Horton v. Green,* 64 N. C., 66.

There is, however, a well-recognized exception to the rule, and "It includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury." *Britt v. R. R.,* 148 N. C., 41.

This is sometimes spoken of as the "shorthand statement of a fact" or as the statement of a "composite or compound fact," several circumstances combining to make another fact, and the tendency of the courts is to enlarge and not restrict this class of evidence (*Lumber Co. v. R. R.,* 151 N. C., 221), because frequently its exclusion would prevent the proper development of the cause of action or defense and injurious effect, if the statement of the witness is not true, may be obviated by cross-examination and the intelligence of the jury.

We have permitted witnesses to testify that a pole on which wires were strung could have been placed differently and a source of danger eliminated (*Horne v. Power Co.,* 144 N. C., 378); that two chains would be safer than one, a fact which, it would seem, would be self-evident (*Britt v. R. R.,* 148 N. C., 41); that a car, used in manufacturing iron, was defectively made (*Alley v. Pipe Co.,* 159 N. C., 328); that a voltage of 110 was not dangerous (*Monds v. Dunn,* 163 N. C., 110), and there are other instances, but the exception has as its foundation, necessity arising from the difficulty, and frequently the impossibility of so placing a number of complicated facts before a jury that the proper deduction may be drawn from them, when a single statement, conveying the impression on the mind of the witness of all the facts, the combination considered together constituting a fact, could be easily understood, and the exception is subject to the limitation that the opinion or inference of the witness must not be on the exact issue to be determined by the jury.

As said in McKelvy on Evidence, p. 176: "It is a method of placing before the jury, in a general and broad way, a group of facts which, in detail, would be difficult of description, but which, as a whole, make up a certain conception, grasped at once by the mind.

"The admissibility of such evidence does not extend to cases where it would not prove helpful to the jury, nor where its application would carry the witness into an expression of real opinion upon matters which it is the jury's province to decide."

This rule, excluding the opinion of a witness on the point in issue, has been approved in *Summerlin v. R. R.,* 133 N. C., 550; *Lynch v. Mfg. Co.,* 167 N. C., 99, and in other cases.

Applying these principles, it was error to permit the witness to express the opinion that the place where the plaintiff was working was not safe.

The facts were few and easily understood—two sets of wires on one pole, the voltage of the wires, their proximity, whether without insulation or not, the fact that they passed through a sycamore tree with swaying limbs, the injury to the plaintiff—and the jury ought to have been permitted to draw the inferences from the evidence instead of the witness.

It was also an expression of opinion on the most important issue raised by the pleadings, it being alleged in the complaint, and denied in the answer, that the defendants failed to furnish the plaintiff a safe place to work.

In view of the pleadings the witness might as well have been permitted to say that in his opinion the defendants were negligent as to say that the place where the plaintiff was working was not safe.

In *Marks v. Cotton Mills,* 135 N. C., 289, the Court, while discussing the admissibility of an opinion expressed by a witness, uses language very pertinent here. The Court says: "The witness, in our judgment, was permitted to invade the province of the court and the jury in thus testifying. A witness should state facts, the jury should find the facts, and the court should declare and explain the law. The functions of the three within their several spheres are clearly defined, and should always be kept separate and distinct. Whether the speeder was so constructed as that its operation was safe to the defendant's employees was the very question upon which the parties were at issue and which the jury were impaneled to decide. The witness' opinion upon that question was incompetent, and the plaintiff's objection to it should have been sustained."

The case of *Hoyle v. Hickory,* 167 N. C., 619, does not decide that a witness may say that certain conduct was negligent, but that the opinion of experts, as to whether streets were properly graded, were not conclusive on the jury.

There must be a
New trial.

HOKE, J., dissenting: I am unable to concur in the decision awarding a new trial on the ground stated in the opinion. There are facts in evidence tending to show that on 21 October, 1919, the defendants, the telephone and telegraph company and the traction company, had their poles and wires along Vickers Avenue, in the city of Durham, and at places and at the point of the occurrence these wires were strung upon the same poles; that the telephone company's wires were in themselves harmless, but the wires of the traction company, two primary wires, each carried 2,300 voltage, and that while it was at times permitted to place such wires on same poles there were recognized rules for the placing of the wires, established by municipal regulations, as necessary to the safety of employees and others engaged in working with or about the same which had been twisted; that at the time of the occurrence plaintiff, employed as lineman by the telephone company, was engaged with others in stringing some additional wires, and as he ascended one of the poles for the purpose he was caught by a current of electricity transmitted from the traction wires and held helpless for some thirty-five or forty minutes, and had his arm burned off, or so severely burned that amputation became necessary, and received other severe burns which caused him great suffering and seriously impaired his health and strength, etc. For this injury, caused by the alleged negligence of both defendants, after an arduous trial involving expenditure of much time and strength, and incurring of much costs and expense, plaintiff has been awarded compensatory damages by the jury, and all this is to be entirely done away with because, as stated, a witness was allowed to say, over defendant's objection, that at the time and place of the injury the wires of the two companies were not in a safe condition, and this on the ground chiefly that the witness was thereby giving an opinion as to a principal question involved in the issue.

The witness who was allowed to make this statement was Chester Whitaker, the city electrician, and had been for more than seven years. He was on the ground about thirty minutes after the occurrence, when there was no suggestion of any change, and he spoke from personal observation of the facts and conditions to which he testified; that he had formerly been employed by the traction company for eight years and by the Carolina Light and Power Company for two years, and had had twelve or fourteen years experience in this line of work. And in further bearing on the correctness of his Honor's ruling in this matter, it appears from the record, and without substantial dispute, that forty or fifty feet west of the pole on which plaintiff received his injuries the wires of both companies ran through a sycamore tree, and there the insulation of the primary wires of the traction company had worn off for two or three inches, and that the swaying boughs of the tree afforded a not improbable means of connection between this exposed wire carrying, as stated, a 2,300 voltage and the telephone wires of the other defendant. And that sixty to eighty feet east of the place of injury the wires of the telephone company were carried over a small piece of plank laid on the top of the glass knobs or insulators of a cross-arm of a traction company pole, and affording a separation between these wires and the high voltage wires of the traction company of not more than six inches.

From this, a statement of the facts chiefly relevant to the question presented, and considered in connection with the fact, also admitted, that plaintiff, in performing his duty as lineman for the telephone company, had been caught by a strong current of electricity and held for thirty-five or forty minutes and till his arm was practically burned off and other serious injuries inflicted, the testimony objected to should not be held for reversible error for the reason that it was entirely harmless. The danger of the conditions presented would seem to stand revealed.

The wholesome principle that a new trial should not be granted for slight errors which could have worked no substantial prejudice to appellant's cause has been again and again approved in our decisions, and has nowhere been stated more clearly than in a recent case of *Brewer v. Ring, etc.*, 177 N. C., 476-484, where *Associate Justice Walker,* in delivering the opinion, said: "Courts do not lightly grant reversals or set aside verdicts on grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like practical treatment of a motion to reverse, and it should not be granted except to serve the ends of substantial justice, citing Hilliard on New Trials (2d Ed.), secs. 1-7."

The same position was stated with approval and applied in a subsequent decision, *Powell v. R. R.*, 178 N. C., 243, where, in reference to some trivial error suggested in the course of the trial, the Court said: "No jury could have been misled or failed to apprehend fully the significance of the issue and the evidence relevant to its proper determination, and assuredly there is no case presented for reversible error. This cause, requiring much time and work, has been fully and carefully tried with the assistance of competent, alert, and diligent counsel on both sides. The determinative issues have been fairly decided, and the results of the hearing should not be disturbed unless it is reasonably made to appear that the appellant's defense has been prejudiced in some way by substantial error." And *S. v. Stancill*, 178 N. C., 683, and *Griffin v. R. R.*, 138 N. C., 55; *West v. Grocery Co.*, 138 N. C., 166, and many other well-considered decisions with us are to like effect. And if the statement of the witness is to be taken as having significance it is to my mind clearly competent, and in no event should it be excluded on the ground advanced in the decision of the Court "That it is an opinion on a fact directly involved in the issue." This position that opinion evidence otherwise competent must be excluded for the reason suggested has to my mind been very much overworked in some of the decisions in the American courts, and with the result that both courts and juries have been deprived of much proper and helpful evidence in the trial of causes before them. As applied in these cases, the doctrine has been criticized by intelligent writers on the law of evidence, and disapproved in the more recent and better considered decisions on the subject. 3d Wigmire on Evidence, secs. 1919-1920. And, accordingly, in my judgment it is now the approved principle that on relevant facts properly established, and on "questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates." And on pertinent facts coming under their personal observation, witnesses who are not in strictness scientific experts may give an opinion relevant to the issue when they are shown to be qualified by training and experience to so aid the jury in coming to a correct conclusion. *Caton v. Toler*, 160 N. C., 104; *Tire Co. v. Whitehurst*, 148 N. C., 446; *Hardy v. Merrill*, 56 N. H., 227-241; McKelvey on Evidence, pp. 230-231; 1st Elliott, sec. 675. In many cases the opinion or estimate or mental inference of such a witness, based upon such facts, is the only way that the evidence can be properly presented, and in such instances, when otherwise competent, it should not be excluded merely because it may be on a fact directly involved in the issue. And our more recent decisions are in full approval and illustration of the principle as stated. Thus, in *Britt v. R. R.*, 148 N. C., 37, question of negligence by an employer in not supplying chains of sufficient strength to pull heavy logs into a car, a witness, taking part and having personal knowledge and observation of conditions, was allowed to state "That a double chain would have been safer than the single one the employees were using."

In *Hux v. Reflector Co.*, 173 N. C., 97, suit by employee for negligent injury in supplying a defective printing press, and witness, "plaintiff, was allowed to state that the press was out of date, old, and worn."

In *Renn v. R. R.*, 170 N. C., 128-141, action for negligence in affording improper place for employee to do his work by which he stepped on the ice and was severely injured. On the question of contributory negligence witness was asked, "Did you cause your own fall in any way?" Answer: "No, I did not. I was just as careful walking as I could be." In disallowing defendant's exception, *Associate Justice Allen* in his opinion said: "*Phifer v. R. R.*, 122, N. C., 940, is authority for the position that the latter part of the answer is objectionable as an expression of opinion, but the later cases and the trend of authority elsewhere are that it is competent as a statement of a fact. *Taylor v. Security Co.*, 145 N. C., 385; *Britt v. R. R.*, 148 N. C., 40; *S. v. Leak*, 156 N. C., 647; 3 Wig. Ev., sec. 1938; McKelvey Ev., p. 220, and quoted with approval from Professor Wigmore, Vol. III, sec. 1949, as follows: 'This topic is one of the few upon which there has never existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable, sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed. Looking first at the orthodox practice in England, it is clear there is not and never has been any real question as to the propriety of such testimony. The morbid and doctrinaire theory of cautiousness, which is the foundation of the American rulings, has never been known at the English bar.' He speaks of the rule of the exclusion as a 'modern excrescence on the common law' and concludes that such evidence is competent."

In the present instance the witness was an experienced electrician who spoke from personal observation of the relevant conditions presented. He saw that plaintiff, in climbing the pole, had to pass the traction wires of one of the defendants and attach the telephone wires to the poles, doing his work just above the traction wires. He saw that these traction wires, carrying a heavy voltage, were exposed just below the pole where they ran through a sycamore tree, and affording conditions that rendered contact between two sets of wires highly probable. He saw conditions that threatened immediately on the other side of the pole where plaintiff was working and received his injury, and with these facts in his possession it was strictly within line of correct principles and directly in accord with our decided cases that this witness was allowed to testify that the conditions presented and personally observed by him were not safe. In my opinion, as stated, the testimony was clearly competent, and if otherwise, it should be disregarded as not amounting to reversible error.

CLARK, C. J., concurs with HOKE, J.

C. A. MOORE ET AL. v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 27 April, 1921.)

1. **Carriers of Freight — Railroads — Commerce—Contracts—Receipts—Stipulations—Written Demand—Federal Statute.**

The usual stipulations in the bill of lading or contract of carriage, requiring written notice to the common carrier for damages as a condition precedent, and upheld as conditions on the right of recovery, and not exemptions from liability for its negligent acts or torts, are changed as they affect interstate commerce by the Cummins' Amendment to the Interstate Commerce Act.

2. **Same—Cummins' Amendment—Reasonable Time.**

Under the Cummins' Amendment to the Interstate Commerce Act, a written demand upon the common carrier for damage caused by its failure to deliver an interstate shipment, is to be made within a reasonable time from the date of shipment, which depends upon the facts and circumstances of each particular case.

3. **Same—War—Evidence.**

In order to show that a written demand for damages had been made within a reasonable time on a common carrier failing to make delivery of an interstate shipment, it is competent for the plaintiff in the action to show that all shipments were then delayed owing to a state of war and the Government's control and pressing need of the carrier's service, and also an epidemic which then affected transportation.

APPEAL by plaintiff from *Ray, J.*, at the November Term, 1920, of DAVIDSON.

This is an action commenced before a justice of the peace to recover the value of certain shoes shipped by express from Brockton, Mass., to Thomasville, N. C., to the plaintiffs.

The shoes were never delivered, and in the express receipt executed by the defendant there was the following stipulation:

"7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as a condition precedent to recovery, claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The plaintiffs filed their claim against the defendant five months and four days after the shipment was delivered at Brockton, Mass., to the defendant.

The plaintiffs offered certain evidence on the question of what was a reasonable time for delivery which will be set out in the opinion.

His Honor reserved the question as to the effect of the stipulation in the receipt and submitted an issue to the jury, and the jury returned the following verdict:

"In what amount, if anything, is the defendant indebted to the plaintiff? Answer: $103.75."

His Honor then held that the plaintiffs were not entitled to recover upon the ground that thirty-four days having elapsed after four months from the time of delivery to the defendant at Brockton that this was not within a reasonable time for delivery as provided in the receipt, and the plaintiffs excepted.

Judgment was entered in favor of the defendant, and the plaintiffs appealed.

H. R. Kyser for plaintiffs.
Robt. C. Alston and Walser & Walser for defendant.

ALLEN, J. It is usual to insert in contracts of shipment stipulations that written notice of a claim for damages shall be given within a designated time, and these stipulations, if reasonable, are generally sustained in the State and Federal courts, and upon the ground that they are conditions on the right of recovery and not exemptions from liability. *Culbreth v. R. R.,* 169 N. C., 725; *R. R. v. Blish Milling Co.,* 241 U. S., 190; 10 C. J., 326 *et seq.*

"The purpose of requiring such notice to be given is to enable the carrier, while the occurrence is recent, to inform itself of the actual facts occasioning the loss or injury, that it may protect itself against claims which might be made on it after such lapse of time as to make it difficult, if not impossible, to ascertain the truth." 10 C. J., 328.

There have been, however, important changes in the form of these provisions as related to interstate shipments, such as the one before us, brought about by the provisos to the Cummins' Amendment to the Interstate Commerce Act, which are as follows:

"*Provided further,* that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The Cummins' Amendment, approved 4 March, 1915, is reproduced in *Mann v. Transportation Co.,* 176 N. C., 107.

It is evident that the express receipt relied on by the defendant was intended to conform to the last proviso, and that it contains its substance, which was intended to relieve from the necessity of filing any claim if the loss or damage is caused by carelessness or negligence due to delay, or while loading or unloading or in transit. *Hailey v. Oregon Short Line,* 253 F., 569.

But the contract of the defendant goes beyond the Cummins' Act by providing that claims must be made in writing "in case of failure to make delivery within four months after a reasonable time for delivery has elapsed," a clause inserted because it is "very generally held that stipulations of the character under consideration have no application where the goods are never delivered." 10 C. J., 335.

The case of the plaintiffs must then depend on whether they presented their claim "within four months after a reasonable time for delivery had elapsed," as they have brought their action in contract, without allegation or proof of negligence, and are not in position to demand the benefit of the exceptions in the contract, because to do so would show an action in tort, which would oust the jurisdiction of the justice, the amount involved being more than $50.

What is a reasonable time for delivery depends on the distance to be traveled, the situation of the parties, the character of the goods, and all the surrounding circumstances, and it is "Generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. . . . The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law. Whether the question of reasonable time is one of fact or law must, 'from the very nature of things,' depend upon the circumstances of each particular case, as business affairs are so kaleidoscopic in their nature that it is seldom, if ever, that any two transactions are exactly alike." *Claus v. Lee,* 140 N. C., 554.

One of the principal inducements to ship by express is quickness of transportation, and under ordinary conditions we would hold as matter of law that a delay of thirty-four days in the delivery of a shipment from Brockton, Mass., to Thomasville, N. C., would be unreasonable, but this shipment was made in time of war, when the Government had charge of and was operating railroads and express companies, and when every power and resource of the country was devoted to one end, the successful prosecution of the war, with consequent preferences given to one class of business and frequent embargoes on others; and the plaintiffs offered to prove "that at this time all shipments were delayed by reason of war conditions; that it was common for shipments to be delayed at this time by reason of the conditions arising by reason of war existing between the United States and Germany, and that thirty-four days was not an unreasonable time to wait for the delivery of this shipment in view of these facts, circumstances, and conditions." Also, "that there was an epidemic of influenza in the United States at the time of this shipment; the defendant company had many employees out by reason thereof, and shipments were being delayed by reason thereof."

This evidence was excluded by the court, when it ought to have been received, as having an important bearing on the question whether notice of claim was filed by the plaintiffs within four months after a reasonable time for delivery had elapsed.

The objection that the plaintiffs did not offer to show that other shipments were made under similar conditions is met by the statement that the plaintiffs proposed to prove by the witness then being examined that this condition applied to *all shipments,* and that thirty-four days was not an unreasonable time to wait for the delivery of this shipment.

If the witness knows the facts and will so testify, the evidence ought to be submitted to the jury under proper instructions.

New trial.

IN RE WILL OF J. VESTAL JOHNSON.

(Filed 27 April, 1921.)

Wills—Holograph Wills—Unmailed Letters—Intent to Make a Will.

A letter written and signed by the supposed testator must, to constitute his last will and testament, show that it was his intention that the paper itself should operate as a disposition of his property, to take effect after his death; and when the letter propounded is found stamped and addressed in the pocket of the deceased after his death, etc., and refers to a conversation with the addressee as to the making of his will, saying he wanted the addressee to write it and the deceased would pay for it; and after saying how the estate was to be disposed of, that the writer would "be up town as soon as he got able," expresses merely an anticipated testamentary intent, and as a matter of law is not operative as a valid will.

APPEAL by propounders from *Ray, J.,* at November Term, 1921, of GUILFORD.

This is a proceeding for the production and probate of a certain paper-writing as the will of J. Vestal Johnson.

At the hearing his Honor found the following facts, to which all parties agreed:

"1. That J. Vestal Johnson died in the county of Guilford, State of North Carolina, after an illness of one week, on June 17, 1918, possessed of real and personal property.

"2. At the time of his death, and some time prior thereto, he had been renting part of his dwelling to the husband of Mrs. Bettie Brinttle, and the Brinttle family was living in said dwelling-house, the deceased reserving a room for his own occupation.

"3. That some few days after his death Mrs. Bettie Brinttle, while engaged in cleaning up the room formerly occupied by the deceased, found a pasteboard box such as is usually used by clothing merchants in which to deliver clothes when sold to customers. That this pasteboard box was in his room, and he usually kept his suits of clothes therein and same was usually kept in his trunk, and he kept his valuable papers in his trunk. That the said Mrs. Brinttle took his clothes out to air, and from the pocket of one of his coats which he had been wearing there fell a stamped envelope sealed and addressed to 'Mr. Joe Sechrest, High Point, N. C.'

"4. That said envelope with its contents was sent by Mrs. Brinttle to the said Sechrest and opened by the said Sechrest and found by him to contain a letter as follows:

HIGH POINT, N. C., 10 June, 1918.

DEAR JOE:—You knew that we was talking about my will. I want you to write my will for me, and also I want you to bury me in a steel-gray casket and a steel-gray case, which can be locked so water can't get to me, and want you to put nice tombs to my grave. You pay $200 for the tombs. And I want to give little Juanita Franklin $100 and little Pauline Lambeth $100; and I want to give Mrs. Brinttle my home house and lot, and the rest of my property to be equally divided among my people. Joe, you please do this favor for me, and I will pay you what you charge for your trouble. I will be up town as soon as I get able. I don't feel good today. I will close. Joe, you copy this with ink for me. As ever,

Your friend, J. VESTAL JOHNSON.

"5. That said paper-writing was not delivered by the decedent to the said Sechrest, to whom it was directed, nor delivered by him to any one, but that it was kept by him from its date, to wit, 10 June, 1918, until his death on 17 June, 1918, and was not out of his possession, although it was sealed and stamped."

All of said paper was in the handwriting of the said Johnson.

His Honor held that said paper was not a will and entered judgment accordingly, and the propounders excepted and appealed.

E. D. Steele and King, Sapp & King for respondents.
L. B. Williams and C. C. Barnhardt for propounder.

ALLEN, J. No particular form is required for the disposition of property by will, and in the application of this principle it has been held frequently that letters were valid as wills when properly executed. *In re Ledford,* 176 N. C., 612.

It must, however, appear that the paper-writing offered for probate, whatever its form, was written *animo testendi,* by which is meant, not that the maker intended thereafter to make a will on the terms of the paper, but that it was his intention that the paper itself should operate as a disposition of his property, to take effect after his death.

In the *Bennett case,* 180 N. C., 5, the court refused probate of a letter offered as a will because it did not appear that it was the intention then to make a will, and among other things says: "A will may take the form of an assignment, or of a deed, or of a power of attorney, or of a letter, or of a promissory note, or of a deed, or order, etc., say the authorities. It may assume the form of any instrument or be absolutely informal. This principle is well settled and numerous examples of such wills are to be found in the law books and decisions of the courts here and abroad. Gardner on Wills (1st Ed.), pp. 36 to 43. And the courts have gone very far to support such documents as valid wills, but at the same time they have required sufficient certainty and assurance as to the intention to presently, or at the time the particular document comes into existence, make a will, and as to that paper being the very will he intended to make. Gardner, at p. 40, says: 'So a letter written by a testator to a friend, authorizing him to take charge and dispose of the testator's property, and to sell and convey the same as his executor, properly attested, sufficiently evidences the testator's intention to dispose of his property, and may be probated as a will. But a letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of a statute, and must express a *genuine* and *not merely an anticipated testamentary intent.'* " And again: "In the case of *In re Estate of C. B. Richardson* (appeal of Nina R. Hardee), 94 Calif., 63, the Court held that a letter, which merely expressed a desire that his sister and her children get everything he owned, but containing words indicating that they should take it by a formal will, or by one he would make, was not testamentary in character, but only the expression of a desire, it clearly not being the intention that the letter should be so construed as to become his last will."

Following these precedents it must be held that the paper-writing offered for probate is not the will of J. Vestal Johnson, because it shows on its face that it was not the intention of the deceased that the paper should operate as a will but merely that he had in contemplation the preparation of a will by which final disposition of his property should be made.

He says, "I want you to write my will for me," indicating a clear purpose to have a will prepared, and that he was simply outlining the contents of a will.

Again, "I want you to give," etc., which is simply an instruction for the preparation of a will. "I will pay you what you charge for your trouble," which was for the preparation of the will.

There is nothing in the paper to show a present purpose that it should be the final disposition of his property to take effect after his death; and, on the contrary, the whole letter gives indication that he was giving instructions for the preparation of a will, and the fact that he retained the paper instead of mailing it furnishes evidence that he had not fully determined what he would do with his property.

The refusal to submit an issue as to the intention of the deceased was not erroneous, as this intent must be gathered from the letter and the surrounding circumstances, and a finding of the jury contrary to the language used in the letter could not be sustained.

Affirmed.

BOARD OF TRUSTEES OF THE FAIRMONT GRADED SCHOOL DISTRICT v. MUTUAL LOAN AND TRUST COMPANY.

(Filed 4 May, 1921.)

1. Constitutional Law — Amendments — Statutes—Public-Local Laws—School Districts.

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the recent amendment to our Constitution forbidding the general assembly from enacting any local or special acts to establish or change the lines of school districts making them void, and requiring legislation of this character by general provisions of law. Constitution, Art. II, sec. 29.

2. Same—Taxation—Bond Issues—Municipalities.

The principle that, under the recent amendments to our Constitution, the Legislature may authorize counties and cities, etc., to issue bonds to provide necessary revenue for their proper governmental purposes, refers only to such as come under the amendments to Art. VIII, secs.

1, 2, 3, 4 of our Constitution, or such as have a valid existence, and not to school districts sought to be established under an act prohibited by our present Constitution, Art. II, sec. 29.

3. Same—Acts Dependent on Unconstitutional Statutes.

Where the establishing of a school district is under an act prohibited by Art. II, sec. 29, of our present Constitution, as a local or special act, the issuance of bonds permitted by the same or similar statute for the revenue necessarily required for the purposes of the invalid act, is dependent upon that act, and falls with it as an unconstitutional measure.

APPEAL by defendant from *Daniel, J.*, heard on case agreed at March Term, 1921, of ROBESON.

This action is to recover purchase price of one hundred thousand dollars ($100,000) bonds of Fairmont Graded School District, issued pursuant to ch. 42, Private Acts of Special Session 1920. Defendant agreed to take said bonds at a definite and satisfactory price, provided same are valid, and resisted compliance on the ground that the act is unconstitutional and the proposed bond issue will not constitute a valid obligation of said district. There was judgment for plaintiff, and defendant excepted and appealed.

McIntyre, Lawrence & Procter for plaintiff.
Johnson & Johnson for defendant.

HOKE, J. From the facts stated in the case agreed it appears that, under Private Acts 1920, ch. 42, the Legislature purported to create Fairmont Graded School District in Robeson County, N. C., defining limits of said district by metes and bounds, same to embrace "all the lands included within the white school district one and three of Fairmont Township, as well as certain land adjoining said district." That, on ratification of the measure by a majority of the qualified voters of the district, the trustees should be empowered to issue and sell bonds in the sum of one hundred thousand dollars ($100,000), the proceeds to be used in procuring a site and erecting suitable buildings thereon, and otherwise for the benefit of said graded school district. The measure having been ratified by the voters, the bonds were prepared and bargained to the defendant at a definite price provided the same were a valid obligation of the district. Defendant resists compliance with their agreement on the ground that said act is unconstitutional. Among the amendments to the Constitution, ratified and becoming effective 10 January, 1917, was one appearing in sec. 29, Art. II, to the effect "That the General Assembly shall not pass any local, private, or special act or resolution (among others) relating to establishing or changing the lines of school districts"; and further, that any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. "The General Assembly shall have power to pass general laws regulating matters set out in this section." The statute in question here, purporting to authorize the formation of this district, and under which the proposed bonds are to be issued, is both special and local and in our opinion comes directly under the constitutional provisions to which we have referred, and this conclusion is not affected because it is a graded school. This applies merely to the method of conducting the school, which is becoming more or less general in all schools supported by taxation, and does not withdraw the present district from the force and effect of the plain and comprehensive words of the inhibition "that no local or private or special act shall be passed establishing or changing the line of school districts." It is contended for the appellee that a school district having been held a public *quasi*-corporation like towns, cities, and other governmental agencies, the same is not withdrawn from control of the Legislature by special enactment or otherwise, under the principle of the recent case of *Kornegay v. Goldsboro,* 180 N. C., 441. The decision, however, referred only to those corporations of a governmental character coming under, and only affected by the amendment to Article VIII, sections 1, 2, 3, 4, and does not and is not intended to affect or control legislation of this kind, which is in direct violation of the express provisions of Art. II, sec. 29, as stated. Again, it is insisted that as the present act contains provisions for a bond issue, it should be upheld under the principle of *Brown v. Comrs.,* 173 N. C., 598; *Mills v. Comrs.,* 175 N. C., 215; that class of cases which hold that none of our recent amendments withdraws from the Legislature power by special legislation to authorize counties, cities, etc., to provide proper revenue for advancing proper governmental purposes, though local in character. But those decisions refer to legislation providing proper revenue for recognized and established objects such as roads, bridges, and the like, and the principle may by no means be extended to legislation providing revenue for a purpose prohibited by our organic law. Here the bond issue is to provide for the erection of buildings and maintenance of the graded school, that is its only purpose, and the establishment of the school being prevented because in violation of the constitutional inhibition, the bond issue necessarily fails with the principle and only purpose for which it was authorized. And this, too, distinguishes the instant case from *Dickson v. Brewer,* 180 N. C., 403, to which we were cited by counsel for appellee. In that case a special act appertaining to Wake Forest School District, affecting its government and authorizing an indebtedness, was upheld, ch. 111, Private Laws 1917, but in *Dickson v. Brewer* the district was established by Laws 1913, ch. 376, prior to our constitutional amendments, and the later legislation presented in the *Dickson case,* through special act, did not come under the constitutional inhibition as to establishing or altering the lines of school districts, which is controlling on the facts of the present record. In our opinion, as stated, the Fairmont Graded School has not been established as required by our Constitution, and the proposed bond issue, which is entirely dependent upon it, and authorized only for the purpose of maintaining it, may not be proceeded with. On the case agreed, judgment must be entered for defendant, and it is so ordered.

Reversed.

L. E. DYE v. ROBERT MORRISON AND WIFE.

(Filed 4 May, 1921.)

1. **Deeds and Conveyances—Registration—Leases—Notice.**

The owner of the fee by a registered chain of title is not affected with notice of a ninety-nine-year lease under which an adverse party claims from a common source until the registration of the lease, no other notice being sufficient under the provisions of our statute, C. S., 3309.

2. **Same—Possession of Lessee.**

The mere possession of the *locus in quo* under an unregistered ninety-nine-year lease is not sufficient notice to the owner of the fee under a valid paper chain of title. C. S., 3309.

3. **Same—Limitation of Actions.**

The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. C. S., 3309.

APPEAL by defendants from *McElroy, J.,* at December Term, 1920, of RICHMOND.

Civil action of ejectment, commenced in July, 1920. Upon trial in the Superior Court the defendants formally made the following admissions:

That the plaintiff is the owner of the fee in the lands described in the complaint and now in the possession of the defendants; that Henry P. Gill was a common grantor; that the said Henry P. Gill, on 29 May, 1896, conveyed the said lands to D. M. Morrison, which deed was duly registered in the office of the Register of Deeds for Richmond County on 8 June, 1896, Book HHH, p. 153, and that said deed is in all respects regular; that plaintiff holds said lands by *mesne* conveyances from the said D. M. Morrison, all of which are properly executed and registered; that the defendants claim right to possession of a portion of said lands described in the complaint under and by virtue of a ninety-nine-year lease from Henry P. Gill, which said lease was duly registered in the office of the Register of Deeds for Richmond County on 4 March, 1912, in Book 68, p. 582, said lease being as follows:

7 April, 1896.

STATE OF NORTH CAROLINA—RICHMOND COUNTY.

Know all men by these presents, I, Henry P. Gill, have leased a piece or parcel of land for ninety-nine years, commencing at a stake at the Nebor Road, running down the said spring branch to the said railroad; down the said railroad to the disputed line, called the Andrew J. Rogers line, and up the said line to the Nebor Road, up the said Nebor Road to the beginning corner. The said above lease to Anny J. Morrison. I herein set my hand and seal.

(Signed) HENRY P. GILL.

I witness the within writing on the other side of the paper.

WILLIAM M. (his X mark) JONES.

That the defendants, upon execution of the said lease, entered into possession of the same until the institution of this action, but the plaintiff and those under whom he claims title, other than said Henry P. Gill and D. M. Morrison, had no actual knowledge of the existence of said lease prior to its registration in 1912.

The only defense set up in the answer is a plea of the ten-year statute of limitations. Upon the pleadings and admissions, his Honor instructed the jury that if they believed the evidence they should answer the issues in favor of the plaintiff. Defendants excepted and appealed.

Ozmer L. Henry and W. R. Jones for plaintiff.
Gibbons & LeGrand for defendants.

STACY, J. It is admitted that the plaintiff is the owner in fee of the *locus in quo,* and that he holds the same under *mesne* conveyances from Henry P. Gill, who conveyed said lands in 1896 to D. M. Morrison, plaintiff's predecessor in title, by deed regular in all respects and duly registered in the office of the Register of Deeds for Richmond County on 8 June, 1896. The defendants claim right of possession to a portion of the lands described in the complaint by reason of a ninety-nine-year lease executed by the said Henry P. Gill to Anny J. Morrison on 7 April, 1896, and under which defendants took possession, but said lease was not registered until 4 March, 1912.

The plaintiff's deed, from the common source of title, having been registered prior to the lease of the defendants, gives him the superior legal claim under our registration laws. *Mintz v. Russ,* 161 N. C., 538; *Combes v. Adams,* 150 N. C., 64. And it has been held with us repeatedly that no notice, however full and formal as to the existence of a prior conveyance, will of itself supply the place of registration. *Fertilizer Co. v. Lane,* 173 N. C., 184; *Allen v. R. R.,* 171 N. C., 339; *Lynch v. Johnson,* 170 N. C., 110. Our statute, C. S., 3309, establishes priority of right from registration within the county where the land is situated. *Weston v. Lumber Co.,* 160 N. C., 263; *Quinerly v. Quinerly,* 114 N. C., 145.

Nor do we think the possession of defendants alone can be said to be notice of any adverse claim. *Lanier v. Lbr. Co.,* 177 N. C., 200. In *Sexton v. Elizabeth City,* 169 N. C., 385, the rule is stated as follows: "The policy of our law now is that purchasers for value should be protected as against unregistered conveyances of the same property from the vendor, as nothing but registration shall be considered notice to them of any prior deed for the land, it having grown into an axiom that 'No notice, however full and formal, will supply the place of registration' "; citing *Piano Co. v. Spruill,* 150 N. C., 168, and *Todd v. Outlaw,* 79 N. C., 235.

From the foregoing, and considering all the facts and circumstances in the instant case, it would appear that plaintiff's cause of action did not accrue until the registration of defendants' lease, and therefore is not barred by the ten years statute of limitations.

Upon a perusal of the whole record, we find no sufficient reason for disturbing the results of the trial.

No error.

D. A. PATTERSON ET AL. v. SALLIE E. McCORMICK ET AL.

(Filed 4 May, 1921.)

1. **Wills—Interpretation—Intent.**

A will is construed as a whole to ascertain the intent of the testator, and, except as to the meaning of words and phrases of a settled legal purport, little help is to be derived from adjudicated cases owing to the usual dissimilarity of facts and expressions used.

2. **Same—Estates—Contingent Remainders.**

Upon a devise to two nephews (named) of the testator, an undivided one-half interest of certain land to each, but upon the contingency of the death of one of the named nephews, without issue, the property to go to the other nephew and the heirs of A. and G.: *Held,* the nephews so named will be presumed to be the primary objects of the testator's bounty, nothing else appearing, and upon the death of one of them, without issue, the half interest devised upon contingency to the deceased nephew will be divided into three equal parts, one part for the surviving nephew, having issue, and one part each to the heirs of A. and G., as the secondary objects of the testator's bounty.

HOKE, J., dissenting.

APPEAL by both parties from *McElroy, J.*, at November Term, 1920, of SCOTLAND.

This is a controversy over the construction of item 3 in the will of Hugh L. Patterson. A jury trial was waived, and from the judgment of the court both parties appealed.

Cansler & Cansler, Russell & Weatherspoon for plaintiffs.

C. W. Tillett, McLean, Varser, McLean & Stacy, Cox & Dunn, McIntyre, Lawrence & Procter for defendants.

CLARK, C. J. This case was before the Court at Fall Term, 1918, *Patterson v. McCormick*, 177 N. C., 448. The main question then was whether the plaintiffs owned any interest in the Hugh L. Patterson plantation, and the Court held that "upon the death of John D. Jowers the title of the plantation in question vested absolutely in the plaintiffs, as the children of Archibald and Gilbert Patterson, and the defendants, the purchasers from Clem Jowers." Upon this trial in the Superior Court it was agreed between the parties, as appears in the record, that there was presented only the question of the quantum of the share belonging to the plaintiffs and the quantum belonging to the defendants in the plantation upon a proper construction of item 3 of the last will and testament of Hugh L. Patterson. The plaintiffs contended that they were entitled to two-thirds of the plantation, while the defendants contended that they were entitled to three-fourths of the plantation. The court below held that the plaintiffs are entitled to only one-third of the plantation and that the defendants are entitled to two-thirds.

The sole question presented is the construction of said item 3 of the will, which is as follows:

"After the death of my mother, I will and bequeath the plantation above mentioned to my nephews, John D. and Clem Jowers, to be equally divided between them. In case they or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson, and to the surviving brother, John D. or Clem Jowers, as the case may be, to be equally divided between them."

John D. and Clem Jowers were nephews of the testator, being children of a deceased sister. Archibald Patterson was a deceased brother of the testator, and left surviving six children. Gilbert Patterson was the husband of Margaret Patterson, a deceased sister of the testator, and left surviving six children. The Jowers boys and all the Patterson children were minors at the time of the execution of the will and the death of the testator. The plaintiffs are the children now living of Archibald and Gilbert Patterson. The defendants are the purchasers from Clem Jowers.

The will must be construed, "taking it by its four corners" and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant. We can derive but little help from adjudicated cases upon facts more or less different from those in this case, for hardly ever can the facts and the language be identical in any two cases. In the construction of a will, therefore, "Every tub stands upon its own bottom," except as to the meaning of words and phrases of a settled legal purport. The object is to arrive at, if possible, the intention and meaning of the testator as expressed in the language used by him.

It is not denied that the intent of the testator as to the property embraced in this item was that John D. and Clem Jowers were the primary beneficiaries, the property to be equally divided between them. It seems to us that in the additional language, "In case they or either of them die without issue, that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson, and to the surviving brother, John D. or Clem Jowers, as the case may be, to be equally divided between them," he did not intend in any way to reduce the one-half given to either of his nephews, if the other should die, but that his intention was to dispose of the half which belonged to the deceased nephew, or if both of them die without issue, then to dispose of the whole of it to the persons intended as secondary beneficiaries. With that view he gave the "property herein bequeathed," *i. e.,* the share which would have gone to the deceased beneficiary or beneficiaries, to be divided between the heirs of Archibald Patterson and the heirs of Gilbert Patterson and surviving nephew if there were such, as secondary beneficiaries.

One of the nephews having died without issue, the "property herein bequeathed" to him, *i. e.,* one-half, was to be divided equally between the heirs of Archibald Patterson and Gilbert Patterson and the nephew. This would give to Clem Jowers, or to the defendants as purchasers of his interest, two-thirds of the plantation and to the other heirs one-third, as his Honor held.

The defendants, however, contend that their share was three-fourths because the heirs of Archibald and Gilbert Patterson should be treated as one, and therefore the intention of the testator was that they should have one-half of the share which would have gone to John D. Jowers, or his issue if he had any, and the other half would have gone to Clem Jowers. We cannot sustain this view. The intention of the testator was that the dividend of John D. Jowers should be equally divided between them, meaning one-third of the John D. Jowers share to the heirs of Archibald Patterson, one-third to the heirs of Gilbert Patterson, and one-third to the surviving brother, Clem Jowers. Indeed, this argument would be self-destructive to the defendants for, as Mr. Cansler pointed out, if the heirs of Archibald Patterson and of Gilbert Patterson were to be treated as one, then there would be ground to hold that the phrase, "The property herein bequeathed," embraced the entire property of which the plaintiffs, treated as one class, would receive one-half and Clem Jowers the other half, and this would destroy the very strong consideration that the testator did not mean to penalize the surviving nephew on the death of his brother by reducing his half to one-third.

A great many decisions might be quoted, as already said, of cases upon facts more or less similar to those in this case, and the opinion might easily be drawn out to a length almost without limit. A great deal of learning might be displayed by a diligent citation of authorities, but it is not reasonable to suppose that the deceased was acquainted with them, or had any reference thereto, in the language used by him, and we should after all come back to the meaning of the language used by the testator in this will. Taken in its ordinary meaning, and construed in connection with the circumstances surrounding the testator at the time of the execution of the will, we think that the construction placed by the court below upon the clause in question was the reasonable, natural, and proper construction, and the judgment is

Affirmed.

HOKE, J. In my opinion, and as affecting the interests of the parties to the record, the devise in this case is to the testator's two nephews, John D. and Clem Jowers, to be equally divided between them, and on the death of either or both of them, the property, that is, the entire property goes over and is governed by the second limitation. John D. Jowers having died without issue, the property under the second limitation should go the one half to the heirs of Archibald and Gilbert Patterson and the other half to the surviving brother, Clem, to have and to hold same in absolute ownership. I do not think that the interpretation giving the words "property herein bequeathed," and in the same sentence, one meaning if one of the brothers should die without issue, and another meaning if both should die, can be sustained; nor do I think that the testator could have intended to cut down the estate of either of the surviving brothers on the death of one of them without issue, but his intent and purpose was, as stated, if one of the first takers should die without issue the interest of the dead brother should go to the heirs of these two Pattersons, and the surviving brother should retain his half in absolute ownership.

R. E. HARRILL v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 4 May, 1921.)

1. **Carriers of Goods—Negligence—Misrouting—Damages—Notice—Bills of Lading—Railroads.**

   Upon the principle relating to the carrier's negligence announced in the former appeal in this case (179 N. C., 540), evidence of the rental value of the printer's outfit and other parts connected with it was competent upon the measure of the consignor's damages under the notice given to the initial carrier of its intended use, though not set out in the bill of lading or written contract of carriage, and which resulted from the wrongful misrouting and reshipment by the carrier.

2. **Same—Refusal of Possession—Reshipment.**

   Where a reshipment of goods is made necessary by the carrier's error in routing it, the carrier may not wrongfully impose a condition to its delivery upon the shipper, and avoid the payment of further damages caused by its making the reshipment itself.

APPEAL by defendant from *Bryson, J.*, at September Term, 1920, of GASTON.

S. J. Durham for plaintiff.
Walter H. Neal for defendant.

WALKER, J. This case was before us at a former term, and is reported in 179 N. C., 540. In that appeal we held that the negligent misrouting of the goods by the defendant carrier, and the consequent long delay in finding them in New York, did not constitute a conversion of the goods so as to allow the plaintiff to recover for the full value of them, and that the defendant is only liable for damages growing out of the delay caused by such misrouting as well as any damages which the goods may have sustained by reason of the shipment to New York, and such damages as he sustained by reason of the reshipment to Gastonia and Charlotte, due to the wrongful conduct of defendant. After a careful examination of the record in this appeal, we are of the opinion that the presiding judge has tried the case in, at least, substantial accordance with the directions of this Court in the other appeal. Without entering into details, we may safely say, in a general way, that there was evidence to support the instructions of the court, and they were not more unfavorable to the defendant than was warranted by the facts of the case, as disclosed at the last trial.

The defendant was fully notified, if the evidence is to be accepted as true, as to what plaintiff intended to do with the goods when they arrived in New York. This communication was sufficient to put the defendant on notice as to the resultant damages should it fail or delay in the delivery of the goods. The recent case of *Pendergraph v. Express Co.,* 178 N. C., 344, is directly in point. See, also, *Thompson v. Express Co.,* 180 N. C., 42; *Neal v. Hardware Co.,* 122 N. C., 104; *Peanut Co. v. R. R.,* 155 N. C., 148, and other cases cited in *Thompson v. Express Co., supra.* "When the goods are to be used for a special purpose, or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages." Moore on Carries, p. 425; Hutchinson on Carriers, sec. 1367; *Thompson v. Express Co.. supra.* There does not seem to be any controversy as to the correctness of this principle or resistance to its application here. The judge explained it fully to the jury. Evidence of the rental value of the printing press, and other parts connected with it, was competent, and properly submitted to the jury. There could be no confusion or misunderstanding as to how it should be used, and there was no danger of charging defendant with double or excessive damages so far as this feature of the case is concerned.

When the goods were ordered to be reshipped to the defendant, the Piedmont and Northern Railway was designated as the final carrier, but the goods somehow fell into the hands of the Southern Railway Company. A sort of fatality somehow attended this shipment, going and returning. As the defendant had the bill of lading issued on the return shipment to itself, and would not surrender it to the plaintiff, so that he could demand and receive his goods at Gastonia, unless he submitted to conditions it had no right to impose, there is no just ground of complaint that he did not get the goods when they arrived at their destination, nor can defendant reasonably object that plaintiff was allowed damages because of the conduct of the defendant in withholding the bill of lading, and thereby depriving plaintiff of the possession and use of the goods. We think that the charge of the court sufficiently covered the case, and that the judge substantially gave every instruction to the jury which was applicable to the facts and to which the defendant was entitled, and we need not discuss the prayers requested by it and which the defendant alleges were refused by the court. The judge could not well have given more of them than he did without impairing the legal rights of the plaintiff.

The verdict may appear to be a very full one, but the learned and just judge who presided at the trial, we have no doubt, properly guarded the defendant's rights in every way, and we are absolutely sure that he did not abuse the discretion to set aside the verdict which resides in him and the exercise of which, in such circumstances, is not reviewable here.

After careful investigation of the case, especially with reference to the errors assigned, we have reached the conclusion that it was correctly tried by the court.

No error.

BEN GREEN v. THE BEN VONDE COMPANY.

(Filed 4 May, 1921.)

1. **Principal and Agent — Common Carriers—Delivery—Presumptions—U. S. Government—Parcels Post—Consignor and Consignee.**

   The principle that makes the consignor the agent of the consignee in delivering a shipment to the common carrier rests upon the liability of the carrier in such instances, and a delivery of a parcels-post package to the U. S. Government postoffice by the sender, when not insured, cannot make the Government, which assumes no liability, the agent of the sendee, without instructions from him to the sender to so send the package.

2. **Same—Instructions to Ship.**

   A laundry company held itself out to the public as obligated to pay the transportation charges for the return of laundry to its customers, upon certain conditions, and received clothes by express, accompanied by a letter instructing it not to return the laundry "C. O. D.": *Held,* equivalent to an instruction to make the return shipment by express, and the laundry company is responsible for the value of the uninsured parcels-post package, coming within its provision as to paying the return transportation charges, upon the failure of its delivery.

3. **Government—Mails—Parcel Post—Presumptive Delivery—Evidence—Rebuttal.**

   The delivery of a parcels-post package to the U. S. postoffice raises a presumption of its delivery to the sendee, which he may rebut by his evidence.

4. **Principal and Agent — Contracts — Consignor and Consignee — Carriers—Railroads.**

An agreement by the consignor to prepay the freight on a shipment to its customers *prima facie* constitutes the carrier the consignor's agent.

APPEAL by plaintiff from *Bryson, J.*, at October Term, 1920, of MECKLENBURG.

This action, begun in the court of the justice of the peace by the plaintiff, a merchant of Columbia, S. C., seeks to recover from the defendants, expert dyers and cleaners of Charlotte, N. C., $191.25 and interest, alleging that the plaintiff sent certain articles of wearing apparel to the defendant company to be cleaned and the same were never returned to him. The defendant contends that it received the clothing by express; cleaned the same, and shipped it back in five packages in the parcels post, uninsured; that four of the packages were received by the plaintiff but that the fifth package was lost in the postal service, and the defendant is not liable therefor. Judgment for defendant, and plaintiff appealed.

Thos. W. Alexander for plaintiff.
E. R. Preston for defendant.

CLARK, C. J. There are eight exceptions: 1 and 2 to the refusal of the court to admit certain testimony; 3 to refusal of the court to charge as prayed; 4, 5, and 6 to portions of the charge as given, and 7 and 8 formal exceptions to refusal of a new trial and to the judgment.

The exception chiefly relied upon is No. 6, to the charge as follows: "The court further instructs you that if the defendant, in due course, caused these articles to be placed in packages and delivered the same to the postal authorities intact and in good condition, that then the responsibility of the defendant ceased, and the postal department became the agent of the plaintiff, and that the defendant would not be responsible for loss in transit while in possession of the postal department."

It is a well-known rule, applicable to common carriers, that "delivery to the carrier is delivery to the consignee," but the question here is whether the delivery of a shipment uninsured to the parcels-post department is delivery to a common carrier. There seems to be no authority in point. We are therefore left to the "reason of the thing."

The plaintiff sent the shipment by express, and did not indicate that he wished the goods returned in any other manner. In his letters he repeatedly mentions the fact that he did not want them returned C. O. D. and said he would pay the bill, thereby indicating that he expected that they would be returned by express. The defendant advertised that it paid charges both ways on shipments where the work netted it over

$10. This shipment netted the defendant $19.78. The cost by parcels post was five cents for the first pound and one cent for each additional pound from Charlotte to Columbia. There is no evidence as to the express charge, but it is reasonable to suppose that it was higher than the postal rate.

The charge excepted to makes the uninsured department of the U. S. Parcels Post the agent of the consignee. The postoffice is a governmental function and cannot be held liable when no insurance on the article is taken out. The reason that delivery to a common carrier is held to be delivery to the consignee is based upon the principle that it is an insurer and liable at all hazards except for the act of God and the common enemy. 10 C. J., 107; *Peanut Co. v. R. R.,* 155 N. C., 164.

If the plaintiff had instructed the defendant to ship the goods by parcels post the defendant would not have been responsible for the nondelivery, for such instruction would have made the parcels post the agent of the plaintiff. The fact that the plaintiff shipped the goods to the defendant by express company was an intimation, if not an instruction, that they should be returned by a common carrier who would be responsible for the nondelivery.

When a letter, or notice of the acceptance of an offer, is deposited in the postoffice, duly stamped, there is a presumption of its delivery to the sendee which may be rebutted by proof of its nonreceipt, but here it is not controverted by any evidence that the goods were not received by the consignee, and the sole question is whether the defendant assumed the risk by shipment of the same without insurance and not by an express company or other common carrier who would have been liable.

Had the defendant delivered the package to an express company or to the postal department, properly insured, there would have been no negligence on his part, but its delivery to the parcels post, uninsured, was caused doubtless by its desire to avoid the expense, which it had advertised that it would bear, of shipping the goods, and the defendant was responsible because of the failure to select a carrier who would be responsible for the safe transportation of the articles or to insure them when sent by the parcels post. In this view it is unnecessary to consider the other exceptions.

We think the proper instruction would have been that if the jury found that the package was placed by the defendant in the postoffice duly stamped, and was shipped by parcels post, this would raise a presumption of its delivery to the consignee which would be subject to rebuttal, and if the jury should find that it was not received by the consignee, then the fact that the package was not sent insured was an assumption of safe transportation by the defendant, in the absence of any instructions to ship by parcels post.

Besides, the agreement to prepay freight was a contract by defendant to deliver at destination, and made the carrier its agent. *Brewing Assn. v. Nipp,* 6 Kan. App., 730; *Com. v. Burget,* 136 Mass., 450; *Weil v. Golden,* 141 Mass., 368; 11 A. & E. (1 Ed.), 742; *Murray v. Mfg. Co.,* 11 N. Y. Supp., 734; *McNeal v. Braun,* 26 Am. St., 447; 35 Cyc., 174, and note, 75; *Devine v. Edwards,* 101 Ill., 138; *Sumner v. Thompson,* 31 Nova Scotia, p. 481 (though prepayment of freight is not conclusive, *Dannemiller v. Kirkpatrick,* 201 Pa. St., 218); and the transportation was at shipper's risk.

Error.

C. W. WISE ET AL. v. J. D. SHORT.

(Filed 4 May, 1921.)

1. **Wills—Letters—Animo Testandi—Signature—Holograph Wills.**

A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying, "Brother Richard, take care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house. . . . I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will, when our statute has been complied with relating thereto.

2. **Courts—Inherent Powers—Interpreter—Wills—Records.**

The court has inherent power to appoint a duly qualified interpreter to act in that capacity upon the probate of a will written in a foreign language and offered for probate in the courts of this State. It is suggested that the original will be copied on the record with its translation.

3. **Mortgages—Deeds in Trust—Sales—Foreclosure—Statutes.**

Where a trust deed to secure money loaned on lands has been foreclosed, C. S., 2591, requires the sale be kept open for ten days for the tender of increased bids, etc., but on the facts of this appeal it appears that an irregularity in conveying the land before the expiration of the statutory time could not have prejudiced any of the parties, and, also, that they are concluded by the judgment upholding the validity of the transaction.

APPEAL by defendant from *Harding, J.,* at April Term, 1921, of MECKLENBURG.

This case comes here upon a case agreed, heard before *Judge Harding,* with reference to the title to a house and lot in the city of Charlotte, N. C., the plaintiffs having entered into an agreement with the defendant for the purchase of the same by him. The defendant, under advice of counsel, declined to take title, for that the same was defective as to a one-half interest in the land purported to have been devised under a will made in the Syrian language by Alex. Salem to Richard Salem, predecessor in title of the plaintiffs; and further, that the other or second source of title to same one-half interest was defective, it being as follows: that the said Richard Salem having failed to pay the amount of the debt secured by the deed of trust due by him to his brother, the devisor in said will, the property was sold by the trustee and purchased by Richard Salem at public sale, but the defendant, through his attorney, objected to the fact that the deed made by the trustee was dated and recorded before the expiration of ten days after the public sale, and said deed of trust having been made after 1 May, 1915. These are the two principal points in controversy. It is admitted that the sale was otherwise regular and that there were no advance bids, and that the estate of the intestate has been duly settled, and that the property has passed through several *mesne* conveyances to the present owner. Judgment for plaintiffs, and defendant appealed.

E. R. Preston for plaintiffs.
No counsel for defendant.

WALKER, J., after stating the facts: The will, dated 6 October, 1918, is as follows:

"Brother Richard, take care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house. Mr. Buchanan will tell you. We do not owe anything else except that. I hope in a few days I will come back. All papers at the same bank we deal with, Box 305. (Signed) Brother Alex."

This paper, though in the form of a letter, is sufficient, in substance, as a holograph will. It was written by the testator and found among his valuable papers and effects. He was about to enter a hospital for treatment when he wrote it, and was apprehensive that he would not survive it, though he expressed the hope that he would return to his home. The paper was evidently written and signed by him *animo testandi,* and he intended it to be his will. It contains evidence of his present intention to dispose of his property and to give it to his brother, Richard Salem, his own name being Alex. Salem. The paper was proved as a holograph will according to the statute, and recorded. That it is in form sufficient to operate as a valid will will appear from the following authorities: *In re Will of Ledford,* 176 N. C., 610; *In re Will of Bennett,* 180 N. C., 5, and cases cited therein; *Milon v. Stanley,* 17

L. R. A. (N. S.), 1126; Gardner on Wills, at p. 40; *Spencer v. Spencer*, 163 N. C., 88; *In re Will of J. Vestal Johnson*, *ante*, 303.

Gardner on Wills, *supra*, says: "So a letter written by a testator to a friend, authorizing him to take charge and dispose of the testator's property, and to sell and convey the same as his executor, properly attested, sufficiently evidences the testator's intention to dispose of his property, and may be probated as a will. But a letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of the statute, and must express a genuine present and not merely an anticipated testamentary intent." Jarman on Wills (6 Ed.), at p. 21, expresses the same view, as follows: "The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses its testamentary character and the intention of the maker respecting the posthumous destination of his property; and if this appears to be the nature of its contents, any contrary title or designation he may have given to it will be disregarded." In this case the testator expresses the present intention that his brother, Richard Salem, should, at his death, have all of his estate. It was no direction to have a will written for him to that effect, but that he should take under the letter then written and signed by himself, and therefore the case falls directly within the operation of the principle set forth in the authorities above cited. The letter was signed "Brother Alex," but that is a sufficient signature as he adopted it as his own, and it is the same as if he had signed his own name in full. "The signing of a will in an assumed or fictitious name has been held sufficient, if the testator intended it as his signature." 40 Cyc., 1104. We need not go so far, as the signature itself is not assumed or fictitious, but clearly indicates the person who used it.

As to the translation of the will by an interpreter of the Syrian language, it is only necessary to say that the court possesses the power to appoint an interpreter for the proper transaction of its business, and any qualified person can be appointed and act in this capacity, as was done in this case. *Farrar v. Warfield*, 8 Martin (La.), p. 695. It appears that the interpreter was duly appointed and sworn. It is said in 15 Corpus Juris., at p. 871: "Provision is sometimes made by law for the appointment of an interpreter for designated courts or purposes; and even in the absence of express authority it is the right and duty of courts to employ and swear interpreters of foreign languages in cases where the necessity therefore arises. An interpreter must be competent to perform the duty assumed." It is considered to be among the inherent powers of the court to appoint an interpreter, if necessary r it to be done, in order that the true meaning of the foreign language ed by witnesses, or in documents, may be understood by the court d jury. 11 Cyc., 720. We suggest that the will in the original text ould be copied on the record of wills in the clerk's office with the anslated copy now there.

Richard Salem conveyed the land to E. R. Preston in trust to secure debt due to W. F. Buchanan, and Preston, as trustee, sold the land der the power contained in the deed to Richard Salem, and conveyed e land to him.

The other question turns upon the proper construction of C. S., 2591, ith reference to the special facts of this case. It is clear to us that was intended by section 2591 to require that the sale be kept open r ten days, so that increased bids might be tendered during that time. ut in this case it is admitted that there was no offer of an increased d by any one, and Richard Salem was the person who received the ed from Mr. Preston and had it registered, so that as Alex. Salem's tate has been fully settled and Buchanan, the creditor of Salem, whose aim was secured by deed, has been paid, we cannot see how any one n be prejudiced by the failure of the trustee to keep the sale open r increased bids, or for the benefit of any creditors, and Richard lem, who seems to be the only one having any right of objection to osing the sale earlier than the time fixed by the statute, was himself sponsible for this irregularity.

We can, of course, decide this case so as to bind and conclude only ose who are parties to it, but as the facts appear in the case agreed, e title of the plaintiffs to the lot seems to be valid, and sufficient to ss as a good and indefeasible one to the defendant by the deed from em to him. The estate of Alex. Salem having been finally settled, ere being no unsatisfied creditors, and Richard Salem being estopped assert any claim, we are unable to see that any cloud rests upon the le.

The court held the plaintiffs' title to be valid and indefeasible and ve judgment for the plaintiffs upon the admitted facts, and defendant pealed, and this Court, for the reasons stated, affirms the judgment.

Affirmed.

WACHOVIA BANKING AND TRUST COMPANY, EXECUTOR OF J. C. TISE, v. MARY G. OGBURN ET AL.

(Filed 11 May, 1921.)

1. **Evidence—Questions of Law—Trials—Trusts—Uses.**

Where the validity of an item in a will devising lands to be held in trust for certain purposes is resisted upon the grounds of insufficient available funds for the purpose and the indefiniteness of the beneficiaries, etc., the construction is one of law when the facts are not disputed, and an instruction to the jury to find the issue in the affirmative, if the jury believe the evidence, is held to be without error under the facts of this case.

2. **Trusts—Uses—Charitable Uses—Equity—Courts.**

A devise in trust of 300 acres of land used for years by the testator as a summer resort, in this case known as the Vade Mecum Springs, leaving it to the judgment of the trustee to develop it by suitable roads, to build a commodious and permanent auditorium for educational, religious and scientific, medical and other worthy organizations, and to develop the property "into not only a watering resort, but an institution after the order of a chautauqua," is held to be for charitable purposes and sufficiently definite as to the beneficiaries, and of stated purpose, to be carried out by the trustee, under the equitable jurisdiction of the courts when circumstances should hereafter require it, and the objection urged that the scheme lacked sufficient funds to carry it out, is held to be untenable under the facts in this case.

3. **Same—Beneficiaries—Cy Pres.**

Where lands are devised in trust, with sufficient definiteness of purpose to be further developed for the charitable use of educational, religious, scientific, medical and other worthy gatherings, "and to develop the property not only into a watering resort, but into an institution after the order of a chautauqua," the discretionary power given to the trustee authorizes it to choose the beneficiaries, and develop the property for the stated purpose, under the supervision of a court of equity when applicable, and the doctrine of *cy pres* has no application.

4. **Trusts—Uses—Charitable Uses—Sufficiency of Funds.**

Where the lands and certain funds are devised in trust to be developed for lawful charitable uses in the discretion of the trustee as to detail, and the testator has sufficiently outlined the general plan, it is not required that the available funds should be adequate for the full design, but it may be applied by the trustee to a practical extent in its own judgment to carry forward the testator's desire as far as it will extend, under the equity jurisdiction of the courts when applicable.

ALLEN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendants from *Finley, J.*, at September Term, 1920, of FORSYTH.

The plaintiff's testator, J. C. Tise, was the owner of the property known as Vade Mecum Springs, a summer resort in Stokes County.

By his will he gave directions for his burial and made certain bequests o his wife and to his relatives, and to the church and to the poor of Vinston, and to the endowment fund of the Y. W. C. A. of Winston, nd then followed:

"Item (i). All the residue and remainder of my estate which it is tended shall include my property in Stokes County, N. C., at Vade ecum Springs, to be set apart and held in special trust to conserve, rotect, and beautify said property, contribute to the construction of uitable roads to and through the premises as well as to a railroad, hould such an opportunity offer, and erect thereon a commodious and ermanent auditorium or assembly room for the meeting and gathering f educational, religious, scientific, medicinal, or other worthy organi- ations or associations. My object and hope being that the same may e developed into and become not only a watering resort, but an institu- ion after the order of a chautauqua."

Then follows the appointment of the plaintiff, the Wachovia Bank- ng and Trust Company of Winston, as executor with full power "to ell any real or personal property at public or private sale as will seem est, and to make title to the same; to change or alter any investments f the estate or the trust herein created, if the interest of the estate or he trust funds appear to be benefited thereby, special care being taken n all cases to avoid speculations and to secure sure and profitable nvestments."

Upon a caveat filed in the Superior Court, it was found that the aper-writing was the last will and testament of said J. C. Tise, and udgment was entered accordingly that the plaintiff, as executor and rustee, "is authorized and directed to proceed to carry out said will n all respects." This is a subsequent action by the said executor and rustee against the widow and heirs at law and devisees to determine e validity, construction, correct interpretation and effect of the above ecited item as to the residuary clause embracing Vade Mecum Springs nd execution of the trust in regard thereto. The heirs at law challenge e validity of the trust upon the following grounds:

First. That the sum available and applicable to the trust is inade- uate and that to use such sum in an effort to carry out the trust will e to waste that portion of the estate without accomplishing any sub- tantial part of the donor's intention.

Second. That, independent of the inadequacy of the fund, the trust void because:

1. The purpose declared is not a charitable purpose.

2. There is an intermingling of charitable and noncharitable urposes.

3. The beneficiaries are uncertain and indefinite.

4. The purpose and plan is uncertain and indefinite, presenting an impractical and visionary scheme without form or definite purpose, with an unlimited range of choice in the trustee, with nothing provided to guide, check, or control an unbridled discretion on the part of the trustee.

It was adjudged by the court that this provision "gives to the plaintiff as trustee the right to make, in its best judgment and sound discretion, reasonable and proper rules and regulations for the management of the trust created in item (i), and that this right of management includes the power of selection amongst the classes of educational, religious, scientific, medical, and other worthy organizations and associations, such as may be entitled to enjoy the benefits of the trust estate—such privilege of selection to be exercised in a reasonable manner and with a charitable purpose.

"That since the management of the trust committed to the trustee includes the right of selection amongst the associations and organizations as a general class mentioned in item (i), and since this right is committed by the testator to the trustee, it is adjudged by the court that no particular organization or association amongst the classes mentioned in the will has or ought to have a vested or exclusive estate in the property described in the will, but that such organizations falling within the classes mentioned in the will have only the privilege of enjoying the benefits of such trust subject to such reasonable rules and regulations as may be established by the trustee, under the direction of the court, for the management of the trust estate.

"That, it having been admitted in open court that all the heirs at law of J. C. Tise, deceased, and all of the legatees and devisees in his will are parties to this action to construe the provisions of the will, it is adjudged by the court that no further or other persons are necessary or proper parties to this action.

"That the plaintiff pay the cost of this action, to be taxed by the clerk of this court, out of the funds belonging to the estate in its possession as executor and trustee.

"This cause is retained for further directions, orders, and decrees."

The defendants appealed.

Richard G. Stockton, Swink, Korner & Hutchins for plaintiff.

Wm. P. Bynum, Holton & Holton, Manly, Hendren & Womble for defendants.

Clark, C. J. The defendants assign as error a refusal to submit an issue tendered by them, "Are the funds available for use in connection with item (i) of the will sufficient to 'conserve, protect, and beautify' the Vade Mecum Springs; 'to contribute to the construction of suitable roads as well as railroad to and through the premises, and to erect thereon a commodious and permanent auditorium or assembly room so as to make thereof and maintain not only a watering resort and an institution after the order of a chautauqua,' as contemplated by J. C. Tise at the time the will was written?"

The exceptions to the admission of evidence need no discussion. The evidence in regard to the location of the property and the surroundings, the buildings thereon, and its suitability for the purposes stated in the will, was uncontradicted, and the court properly held that the evidence presented a question of law only, and instructed the jury if they believed the evidence to answer the issue "Yes."

The defendant earnestly argued that to carry out this item of the will of the testator would be a waste of money, but the evidence does not sustain this proposition. The object of the testator as stated in the will was "to conserve, protect, and beautify this property of 300 acres which had been used for years as a summer resort; to contribute to the construction of suitable roads to and through the premises as well as to a railroad, if such opportunity should offer; to erect thereon a commodious and permanent auditorium or assembly room for the meetings and gatherings of educational, religious, scientific, medicinal and other worthy organizations or associations, and to develop the property into not only a watering resort, but an institution after the order of a chautauqua." The funds of the property were adequate, without contradiction, for that purpose. Since the establishment of the New York Chautauqua there have been many similar institutions, more or less modified, carrying out that idea, established throughout the country. Even in this State there is at Black Mountain a somewhat similar retreat known as Montreat, and also near Black Mountain, Robert E. Lee Hall at Blue Ridge; near Waynesville there has been established by the Southern Methodist Church another known as Junaluska, and there are probably others. The testator's designation of "an institution after the order of a chautauqua" is not invalid on the grounds urged. The plan is neither "impossible, impracticable, a waste of money or visionary." There is a large discretion left in the executor, but the description of the design is sufficiently definite to be worked out on a practical plan. We have had similar cases in which the devise has been sustained by the courts as in the *Griffin School case* from New Bern, *Griffin v. Graham,* 8 N. C., 96; the *Clemmons will case, Keith v. Scales,* 124 N. C., 512; *Paine v. Forney,* 128 N. C., 237, and other cases cited. There is in this case not only, according to the evidence, the 300 acres of land with the buildings thereon, but a fund of $209,000 in the hands of the trustee, a well known and capable trust company. As was said in the *Clemmons will case,* if the trustee should fail to carry into effect the trust it will be time enough then to invoke the supervision of the court.

It is true that the doctrine of *cy pres* is not recognized in this State, and it is not called for here simply by the fact that the testator wisely did not attempt to work out all the details of the plan which he knew must be modified by future developments. He wisely laid out the nature of the plan and left the details to the executor to carry out and execute his idea. It may be, but we do not now decide this, that it will become necessary to create a subsidiary corporation to execute the trust efficiently.

It is not a matter of any consequence, but as it is well to be correct, it is not inappropriate to say that the pronunciation of the phrase *"Cy Pres,"* which is Norman-French, is "see pray," Webster's International Dictionary, and not *"si pres,"* as we so often hear it called.

In *Paine v. Forney,* 128 N. C., 237, the Court held that where the fund could be applied to the indicated charitable purpose, it should be so applied, although insufficient to accomplish all the testator's desire. In this case, the terms of the will are much more elastic than in the *Forney case,* for the trustee is left to apply the funds in the best possible manner. If the funds had been even smaller in the beginning than they are, with the passing of the years, by natural accumulation, it may grow apace without violence to the object intended. The inadequacy of the trust fund, if it were inadequate, cannot in any way affect the validity of the trust. Whether it will be inadequate or not depends entirely upon the extent of the plans adopted, and we cannot presume in advance that the executor will not make his plans wisely and within the scope of his funds. We must presume that he will plan according to the funds devised or to be expected; in short, that the trustee will "cut the coat according to the cloth."

Whether the purpose of the testator was wise or not is not for the court. The trust created by the testator is a valid charitable trust, and the courts will, if necessary, so supervise its administration as to accomplish the purpose expressed in the will.

In *University v. Gatling,* 81 N. C., 509, the testator provided that the fund should endow five scholarships in the University of North Carolina. The fund was insufficient to carry out this purpose, but the court held that this bequest was valid and should go as far as possible to carry out the will of the testator. This is not the doctrine of the *cy pres* which is to apply the sum to some other purposes "equally as good," but is the application of the fund to the very purpose named, as far as it will go.

The purpose of the will is thus clearly expressed by the testator: "My object and hope being that the same may be developed into and become not only a watering resort, but an institution after the order of a chautauqua." There is no ambiguity about this intention, and the absence of detailed provisions does not make it indefinite, but most wisely leaves the development of the idea to the trustee, subject always to the supervision of the court, whenever it may be invoked, to require the trustee to conform to the general intentions of the bequest.

Whether the location at Vade Mecum is the best possible for the purposes intended by the devisor, is not a matter for the Court, and does not in any way affect the validity of the bequest. The general charge that the bequest was impractical was made in the *Girard will case,* 2 Howard U. S., 127; 84 Am. Dec., 470; and also in *Keith v. Scales,* 124 N. C., 497, and can always be urged with more or less plausibility against any devise of this nature. We think the devise in this case is sufficiently definite, that it is practicable and not forbidden by law or public policy. The object is to establish a chautauqua, the operation of the watering place is to raise funds for its support and maintenance.

In the *Girard will case, supra,* the Court said: "Possibly some of the directions given for the management of this charity are very unreasonable and even impractical, but this does not annul the gift. . . . The rule of equity on this subject seems to be clear, that when a definite charity is created the failure of the particular mode in which it is to be effectuated does not destroy the charity. . . . So that the substantial intention shall not depend on the insufficiency of the formal intention." In that case Daniel Webster said: "No good can be looked for from this college. If Girard had desired to bring trouble and quarrel and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to the result, it will be the crowning mercy of my professional life." He was speaking with the zeal of counsel for his client, basing his remarks largely upon the provision in the devise that no minister of the gospel should ever be permitted to enter the precincts of the college. Great man as he was, he was as mistaken on this occasion as when he prophesied that the Pacific coast (then recently acquired by this country) would be forever barren, useless and uninhabited.

The courts can be but little influenced by predictions of this kind. The only question before us is not the anticipations of counsel, warmed by zeal for their clients, but whether the devise is legal in its purposes and practicable of administration. Whether the fund shall be sufficient to carry out the development intended to the full scope of the testator or not, it is sufficient as to the extent of the fund which can be used for that purpose. In *Keith v. Scales, supra,* it is said, in speaking of the Griffin free school devise, which it had been sought to invalidate, "The school had no previous existence, but was established by the trustee. The Court upheld the trust, and the institution is still the pride of New Bern."

It is rarely the case that counsel representing clients who are the heirs at law of the testator can see and appreciate the wisdom of a testator who disposes of a considerable estate to charity or other purposes for the public welfare. We need not draw out this opinion by the recital of decision after decision sustaining general purposes similar to this. Those we have already cited can be duplicated manifold by diligence in collecting them. It is sufficient to say briefly that:

1. The validity of the trust does not depend upon the adequacy of the fund to execute it to the full extent of the intention of the testator.

2. The purpose of the testator was the creation of an institution for the public benefit and therefore not illegal. The method of executing the trust was largely and wisely left to the executors within the general scope of the purposes recited in the will; and, as already stated, should there be a deviation from that purpose the correcting hand of the court of equity can at any time be invoked.

The heirs at law insist that on account of the uncertainty of the beneficiary no person could, by right, claim benefit under the will. In *Keith v. Scales,* 124 N. C., 512, the Court, in answer to the objection that "there are no beneficiaries mentioned in said paper-writing sufficiently identified that can enforce the trust," said: "That was true in the *Girard College case,* the *Griffin School case,* and all similar instances. In those cases, what boy could come into court and say, 'I, among others, was intended to enjoy this bounty,' the trustee could answer, 'In our judgment you are not best entitled to the benefit of the donation.' Yet such devises were upheld."

In cases of this kind, to defeat a bequest for public charity, the precedent most generally relied upon by the heirs at law and next of kin is the famous *Tilden will case, Tilden v. Green,* 130 N. Y., 29, but it must be noted that that case was decided upon a statute of New York which requires that to constitute a good charitable trust the testator should select and designate the ones to be benefited. This has never been held except in that State and in others having a similar statute. In this, and in a large majority of the states, it is sufficient if the testator describes definitely the general nature of the trust. He may leave the details of the execution to the trustee under the superintendence of the court of equity. A gift to charity is complete without reference to any of the suggestions or directions of the testator as to the details of the manner in which it shall be carried into effect. 5 R. C. L.; 63 Am. St., 169, note; *Russell v. Allen,* 107 U. S., 166.

The rule is thus stated in *Keith v. Scales,* 124 N. C., 512, quoting authority: "It is immaterial whether the person to take be *in esse* or not, or whether the legatees were at the time of the bequest a corporation capable of taking or not, or how uncertain the object may be, provided there be a discretionary power vested anywhere over the application of testator's bounty to these objects."

In this State a gift to public and charitable uses will be sustained when not opposed to any express provision or the plain policy of the law, provided the objects are specific enough that the court by decree can effectuate them. *School v. Institution,* 117 N. C., 164; *S. v. Gerard,* 37 N. C., 210. In the latter case the devise was to "the poor of the county." No more indefinite designation of a class could be imagined. The term "poor" is relative, but the Court sustained the devise as specifying the class out of which the individual beneficiaries were to be selected.

The tendency of modern thought is more and more that the ownership of great wealth is not merely for the transmission of it to one's own family, but that it is largely a public trust, and that where the fund is more than sufficient for the reasonable needs of the heirs and next of kin, there should be some direction given by devise for the public welfare or for the general benefit of the community.

Neither the right of inheritance nor of disposition by will are inherent, but both are entirely statutory. At common law, at death all the personalty went to the church to be disposed of *"in pios usos";* and later, by statute, it went to the executor or administrator without accountability, and, later still, was disposed of by the statute of distributions, if not bequeathed. The real estate passed to the heir, but subject to the right of the lord to wardship or a fine (which was a year's rent) and other feudal charges. As to the disposition of realty by will, in *Hodges v. Lipscomb,* 128 N. C., 57, it is said: "When one closes his eyes on sublunary scenes, and from his cold grasp drops the things for which he has toiled or sinned, he has no natural right to direct what shall become of them thereafter. The right to dispose of property by will is purely statutory, as Mr. Blackstone tells us. From the Conquest down to the comparatively recent statutes of wills, 27 and 32 Henry, VIII, the power to dispose of realty by will did not exist in England (2 Bl. Com., 374). This right is not recognized, or recognized only to a limited part of the estate, in France and many other countries. As it is given by statute, it may be modified or revoked by statute."

While Mr. Carnegie's assertion that "To die rich is to die disgraced" cannot be sustained, those rich men should be remembered with honor who devote some part of their estate to widen opportunity and enjoyment for the public. In death, as in life, those who have accumulated large estates should have regard "for the spears of Judah and the archers of Benjamin"—that solid mass of men who have lived in poverty or struggled through life on small means, yet whose law-abiding spirit has protected the property of those who have made large accumulations of wealth, in safety and untroubled by the spoiler. Not to do this is to fail in their reasonable duty to the community and to defeat the just expectations of the public.

The courts always lean strongly to support and sustain all reasonable execution of such bequests and devises.

No error.

ALLEN, J., dissenting: The question to be decided on this appeal is the validity, as an alleged charitable trust, of item "i" of the will of J. C. Tise, which reads as follows:

"All of the residue and remainder of my estate, which it is intended shall include my property in Stokes County, N. C., at Vade Mecum Springs, to be set apart and held in special trust to (1) conserve, protect, and beautify said property; (2) contribute to the construction of suitable roads to and through the premises as well as railroads, should such opportunity offer; and (3) erect thereon a commodious and permanent auditorium or assembly room for the meetings and gatherings of educational, religious, scientific, medicinal, and other worthy organizations or associations. My object and hope being that the same may be developed into and become not only a watering resort, but an institution after the order of a chautauqua."

It will be noted that there is no limit as to the beneficiaries of the trust, and that they are all "educational, religious, scientific, medicinal, and other worthy associations" throughout the world, and as such I think it is too indefinite to be enforced.

The authorities on the question are numerous, but I shall only refer to three or four North Carolina cases taken from brief of appellant which, I think, are decisive.

In *Bridges v. Pleasants*, 39 N. C., 26, it was held that a bequest, "to be applied to foreign missions and to the poor saints; this to be disposed of and applied as my executor may think the proper objects according to the Scripture, with the greater part, however, to be applied to missionary purposes," was too indefinite and, therefore, void, notwithstanding the executor had accepted the trust and had formed a scheme for administering it whereby the trust fund would be used in accordance with the purpose of the donor.

Ruffin, C. J., said: "The paper must tell us the testator's meaning or we can never find it out. . . . Wherever the aid of the court is invoked there must appear some right in the person who applies, or for whose benefit it is sought, to support a gift by will. In the present case it is impossible, from anything appearing in the will, to conjecture how, by whom, or in whose favor these sums of money were to be administered. What kind of 'foreign missions,' whether diplomatic or religious, or, if the latter, of what sect or to what countries, no man can say. So, likewise, of the 'home missions.' The gift to the 'poor saints' is equally indefinite. . . . The poor of the country or city are proper objects of such charity; for the objects of bounty are readily known, and their number easily ascertained, and the gift is in fact to the public. But the 'poor saints,' if it could be known who they are at all, are not mentioned in the will as of any county, nor country; but, if any can take, all such persons throughout the world are to share in it, which is preposterous."

In *Holland v. Peck,* 37 N. C., 255, the testator directed his executors to pay certain moneys "for the benefit of the Methodist Episcopal Church in America, whereof Francis Asbury is the presiding bishop, this sum to be disposed of by conference or the different members composing the same, as they shall, in their godly wisdom, judge will be most expedient or beneficial for the increase and prosperity of the gospel." It was held (*Gaston, J.*) to be a devise upon trust, and void for indefiniteness.

It was further held that the precise purpose of the testator in the bequest cannot be collected therefrom. The disposition of the money is directed to be made by the conference "as they shall, in their godly wisdom, judge will be most expedient or beneficial for the increase and prosperity of the gospel." The distribution of the money is to be the advancement of the gospel. But the means by which that end is to be effected are left entirely to the uncontrolled discretion of the conference. Is the money to be employed in building churches, in establishing schools, in paying ministers, in publishing books, or in supporting the poor? . . . It is certainly the general rule that, where property is given upon a clear trust but for uncertain objects, the subject of such trust is regarded as undisposed of, and the benefit of the trust results to those to whom the law gives the property in default of disposition by its owner. In the case of a trust, there must be somebody in whose favor the court can decree a performance."

After pointing out what the doctrine of a trust in favor of the next of kin in such case does not obtain in England because of the doctrine of *cy pres,* the Court, speaking of that doctrine, says:

"The principle is admitted to be unsound, and several of the decisions founded upon it are revolting to common sense. . . . But we have no instance in this State . . . where this extravagant doctrine on the subject of charities has ever been acknowledged. . . . By affecting to consider charity as the substance, and all else as but the formal part of a will, and compelling the testator to be charitable in our way, when we do not know in what way he purposed to be charitable, or when the charity he purposed can be executed, we shall, in effect, be making a will for him where he is silent, and altering it when his declared intention necessarily fails."

A bequest "to some promising young man of good talents and of the Baptist order, to be selected by my executors," is void "because of its indefiniteness. There is no person who can claim it." *Hester v. Hester,* 37 N. C., 330.

A devise that land should be sold and "the proceeds laid out in building convenient places of worship, free for the use of all Christians, who acknowledge the divinity of Christ and the necessity of a spiritual regeneration," is void for uncertainty. *White v. University,* 39 N. C., 19.

In stating the general grounds upon which gifts to public charitable uses will be sustained in equity, *Ruffin, C. J.,* declared the doctrine of this Court to be that such gifts will be sustained "when not opposed to the express provisions or the plain policy of the law, provided the object is so specific that the Court can by decree effectuate it, by compelling the execution of the will, according to the intention of the donor, and keeping the subject within the control of the Court, so as to have the will of the donor observed. . . . It seems to us that it would be impossible for the Court to keep any control over such persons or property; and, therefore, that this is a trust, which the Court cannot undertake to execute, since it cannot execute it effectually."

These cases have been frequently affirmed, and in all of them the purpose of the testator was as commendable and as definitely expressed as in the one before us.

Indeed, I do not see how a trust could be made more indefinite and uncertain than one to all "worthy organizations or associations," embracing, as it does, the whole world.

It is also doubtful if this is a charitable trust as it does not appear that it is a gift, and there is nothing to prevent the trustee from making the usual charges for accommodation at fashionable resorts, which would be prohibitive to a majority of the membership of the different organizations referred to in the will.

I think the judgment of the Superior Court ought to be reversed.

WALKER, J., concurs in this opinion.

THE STEPHENS COMPANY v. MYERS PARK HOMES COMPANY.

(Filed 11 May, 1921.)

1. Easements—Streets—Highways.

The right to an easement in a public street or highway, as a general rule, may be acquired by grant or dedication, by the exercise of the power of eminent domain, or by user for the requisite time.

2. Same—Dedication—Plats—Divisions—Maps—Land Development.

Where lands have been platted into blocks, lots and streets, etc., and thus developed and sold by deeds referring in their descriptions to the plat, it has the effect of a dedication as between the grantors and the purchasers, not only as to the streets, etc., adjoining each purchaser, but also as to all those appearing upon the designated plat, without any authority of the grantor to change them, unless such power is specifically reserved to them.

3. Same—Deeds and Conveyances—Subdivisions—Dedication—Estoppel.

Where the owner of several tracts of land has them platted into several subdivisions, showing blocks, lots and streets, and has sold the lots by conveyance referring each lot to its respective subdivision for description, some of these subdivisions reserving the right to alter and change streets under certain conditions, and as a part of the general scheme has theretofore mapped the entire property in general outline, showing thereon some of the streets, for the purpose of aiding investigation of title, which were never constructed: *Held,* the question of dedication and estoppel between the owner and the purchasers will apply only to the divisional map on which each lot respectively appears, and the various subdivisions will not be regarded as an integral part of the entire tract considered as a whole.

4. Same—"Key Maps."

Where the deed of a purchaser of a lot refers for description to a divisional map of lands laid off into blocks, lots and streets, he may not refuse title to the lot so purchased upon the ground that he would receive a smaller lot than he had purchased, because an original map in general outline, and used for an entirely different purpose in the general scheme for development, showed the adjoining street as broader and shaped differently, thus giving an easement in the *locus in quo.*

5. Same—Registration—Notice.

Where a body of land has been platted and mapped into blocks, lots, and streets by several separate and distinct divisions, and lots sold with reference to each division respectively for description, the streets shown on the divisional map of each respective lot, as between the owner and purchaser, is dedicated to the owners of the lot therein; and the fact that a prior registered "key map," or one in general outline of the entire tract, had some streets marked thereon, will not be regarded as a dedication of those streets so as to give the purchasers any rights therein.

APPEAL by defendant from *Harding, J.,* at March Term, 1921, of MECKLENBURG.

Controversy without action, heard upon the following agreed statement of facts:

"1. That both plaintiff and defendant are corporations organized and existing under the laws of the State of North Carolina, with their principal offices in Charlotte, N. C.

"2. That the defendant, the Myers Park Homes Company, hereinafter called the Homes Company for convenience, entered into a certain written contract with the plaintiff, the Stephens Company, to purchase from the latter a certain lot of land, hereinafter fully described, in the suburb of the city of Charlotte, known as Myers Park, a real estate development belonging to the Stephens Company, and paid a part of the purchase price therefor at the time of the execution of said contract, the balance being payable upon delivery of the deed to said lot, and that said lot is described as lot 6 or Block 11-A of Myers Park, according to revised map of said block, recorded in Book 230, at page 131, in the office of the Register of Deeds for Mecklenburg County, North Carolina.

"3. That the Stephens Company has tendered to the Homes Company a properly executed fee-simple deed, with the usual covenants of warranty, to said lot and has demanded the payment of the balance of the agreed purchase price, to wit, the sum of $1,305; and that the Homes Company has refused and still does refuse to accept said deed or to pay the balance of the purchase price on the ground that a portion of said lot has been dedicated to street purposes and is now subject to the easement thereof.

"4. That the facts with respect to the alleged dedication are as follows:

"(*a*) That Myers Park is a real estate development adjacent to the city of Charlotte, comprising 1,100 acres or more of land; that when this development was first undertaken, a survey of the entire tract was made and general plans for the proposed development, which were to be subsequently worked out in detail, were prepared and embodied on a certain map hereinafter called 'key map.'

"(*b*) That on account of the fact that the title to Myers Park property was derived from different sources, and that the property was composed of large tracts of farm lands, the boundaries of which were difficult to locate accurately, lawyers found the examination of titles and the preparation of abstracts of titles to property within this development exceedingly troublesome without some assistance. That solely for these reasons the said 'key map,' on which notations were made showing the source of title of its various tracts thereon shown, was 'recorded' on or about the first day of December, 1913, in the office of the Register of Deeds for Mecklenburg County, North Carolina, in Book 230, at page 241, for the convenience of attorneys, and also to outline the general proposed scheme of the development, but absolutely without any intention whatever of making said map final or conclusive as to any details, the said key map, in fact, not containing sufficient information to locate or to furnish a correct description of any block, lot or street; and further, that the provisions of Gregory's 1913 Supplement to Revisal of 1905, Rev., sec. 263 (a), Acts 1911, ch. 55, and our registration laws in general were not complied with in 'recording' said map, there having been neither the required proof upon oath by the surveyor nor the required probate.

"(*c*) That no sale or conveyance of property has ever been made by reference to said 'key map,' but, on the contrary, all sales and conveyances have been made by reference to different detail maps which are called subdivisional plats, and which are referred to specifically in all deeds conveying property in Myers Park.

"(*d*) That from time to time, as the Stephens Company undertook to sell lots in the various sections of Myers Park, the general plan was worked out and the detailed maps or subdivisional plats were prepared and recorded, showing one or more blocks, the streets adjacent thereto, the various lots in the blocks, and the exact dimensions of all such blocks, streets and lots.

"(*e*) That in all conveyances of property within Myers Park, lots have been described by lot and block numbers, as shown by certain of said subdivisional plats recorded in the office of the register of deeds, which were specifically referred to, and have usually been described also by metes and bounds. For example, the lot in controversy, in addition to the description by metes and bounds, is described as lot 6 of Block 11-A, according to revised map of said block recorded in Book 230, at page 131, in the office of the register of deeds, this map being a subdivisional plat.

"(*f*) That, not later than 1 September, 1913, a subdivisional map of Block 11-A was made and recorded in Book 230, at page 131, in the office of the register of deeds for Mecklenburg County, showing Boulevard A, now Morehead Avenue, as a curved street, of the width of 110 feet, but that said street was never physically designated, improved, opened or used as thus shown.

"(*g*) That thereafter, on or about 4 December, 1916, the said subdivisional plat of Block 11-A in the office of the register of deeds was revised, as shown on the plat thereof, said Boulevard A, now Morehead Avenue, being shown thereon as a straight street, of the width of 80 feet; and that after this revision was made, said street was laid out and paved, as shown on said revised plat, and has been used by the public as thus constructed since the spring of 1917.

"(*h*) That prior to the revision of said plat no lot was sold in Block 11-A or in any other block adjacent to Morehead Avenue, but that one or more lots in Block 11-A facing on Queen's Road were sold, all deeds therefor, however, containing the following provisions:

"'The foregoing property is conveyed subject to the following covenants, conditions, and restrictions, which the party of the second part, for himself, his heirs and assigns, hereby covenants and agrees to perform and abide by.

"'12. The Stephens Company, its successors or assigns, shall have the right to change, alter or close up any street or avenue shown upon said map not adjacent to the lot above described and not necessary to the full enjoyment by the party of the second part of the above described property, and shall retain the right and title to and control of all streets and avenues within the boundaries of Myers Park, subject, however, to the rights of the party of the second part for the purposes of ingress and egress necessary to the full enjoyment of the above described property.

"'13. It is expressly understood and agreed by the parties hereto that all of the foregoing covenants, conditions, and restrictions, which are for the protection and general welfare of the community, shall be covenants running with the land.'

"(*i*) That said Morehead Avenue, while convenient, is not necessary for the purpose of ingress and egress, nor for the full enjoyment of any of the lots in Block 11-A which were conveyed prior to the revision of said subdivisional plat; that Morehead Avenue, as revised, constructed, and now existing, serves all necessary or useful purposes, except that it is straight instead of curved and is somewhat narrower than before the said revision, and that it is wider than the average street in Myers Park and in the city of Charlotte.

"(*j*) That after the recordation of the original subdivisional plat of Block 11-A, and before the revision thereof, lots in other parts of Myers Park were sold, in the deeds to which the Stephens Company did not reserve the right to change, alter, or close up streets within Myers Park; that in none of said deeds was any reference made to the map of Block 11-A, nor, as stated, was any lot in Block 11-A so sold.

"(*k*) That Morehead Avenue, if constructed as shown on the original subdivisional plat of Block 11-A, would cover a portion of the front of lot No. 6 several feet in width at some points.

"5. That it has been agreed by the parties hereto that if, upon the foregoing facts, the court be of the opinion that said deed will convey to the defendant an indefeasible fee-simple title, free and clear from all easements of every nature, on account of the said original subdivisional plat of Block 11-A and the streets shown thereon, then and

n that event the plaintiff is entitled to and shall recover of the defend-
nt the sum of $1,305, the balance of said purchase price, and all costs
f this action; but that if the court be of the opinion that upon the said
acts there has been a dedication of said street, as shown in original
ubdivisional plat, and that said lot is subject to the easement thereof,
hen the plaintiff shall recover nothing and shall be taxed with all
osts: *Provided, however,* that either party may appeal to the Supreme
'ourt of North Carolina from the decision of this case by the Superior
'ourt. Wherefore, the parties of this proceeding pray the court that
ieir relative rights under the facts hereinbefore set forth be determined
nd judgment rendered accordingly."

His Honor, being of opinion that the deed tendered by plaintiff was
ıfficient to convey a fee-simple title to the lot in question, free and
lear of the alleged easement, rendered judgment in favor of the plain-
ff in accordance with the agreement between the parties. Defendant
ppealed.

H. C. Dockery and C. H. Gover for plaintiff.
Clarkson, Taliaferro & Clarkson for defendant.

STACY, J. As a general rule, it may be said that the right to an ease-
ıent in a public street or highway may be acquired by grant or dedi-
ıtion, by the exercise of the power of eminent domain, or by user for
ıe requisite length of time. *Sexton v. Elizabeth City,* 169 N. C., 385.
he principle involved in the instant case is one of dedication or
quitable estoppel. Discussing the law applicable to this question, it
as said in *Wittson v. Dowling,* 179 N. C., 542:

"It is the recognized principle here and elsewhere that when the
wner of suburban property or other has the same platted, show-
ıg lots, parks, streets, alleys, etc., and sells off the lots or any of
ıem, in reference to the plat, this, as between the parties, will constitute
dedication of the streets, etc., for public use, although not presently
pened or accepted or used by the public," citing *Elizabeth City v. Com-
ander,* 176 N. C., 26; *Wheeler v. Construction Co.,* 170 N. C., 427;
reen v. Miller, 161 N. C., 25.

The same principle was declared in *Green v. Miller, supra,* with rea-
ns therefor, as follows:

"Where the owner of real property lays out a town or village upon
, or even a plat of ground, and divides it into blocks or squares, and
ıbdivides it into lots or sites for residences, which are intersected by
reets, avenues, and alleys, and he sells and conveys any of the lots
ith reference to a plan or map made of the property, or where he sells
conveys according to a map of the city or town in which his land is

so laid off, he thereby dedicates the streets and alleys to the use of those who purchase the lots, and also to the public, under certain circumstances not necessary to be now and here stated. . . . The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

This doctrine is founded upon principles of equity and fair dealing and has been stated and restated in so many decisions of this Court that it may be declared now as settled and no longer open for debate. *Hughes v. Clark,* 134 N. C., 457; *Davis v. Morris,* 132 N. C., 435; *Collins v. Land Co.,* 128 N. C., 563; *Conrad v. Land Co.,* 126 N. C., 776; *S. v. Fisher,* 117 N. C., 733, and numerous cases of like import.

In *Collins v. Land Co., supra,* it was held "That a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires the right to have all and each of the ways and streets on the plat or map kept open." In support of this position, the following was quoted with approval from Elliott on Roads, sec. 120:

"It is not only those who buy lands or lots abutting on a road or street laid out on a map or plat that have a right to insist upon the opening of a road or street, but where streets and roads are marked on a plat and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

The principles of law here involved have been clearly established, and they afford no cause for division of opinion. But the difficulty in the case at bar arises from an effort to apply the given facts to these settled principles. The defendant refuses to accept the deed tendered by plaintiff, alleging that a portion of the lot intended to be conveyed thereby has been dedicated to street purposes, and is now subject to such an easement. The validity of the deed is assailed chiefly upon two grounds:

1. Defendant contends that the plaintiff made and recorded a subdivisional plat of Block 11-A of Myers Park, in which is located lot No. 6, the lot in controversy, showing and providing for a street known as Boulevard A, now Morehead Avenue, which, if located as shown, would cover a strip across the front of said lot several feet in width; that said subdivisional plat was subsequently revised, changing said street from a curve to a straight street and narrowing it in width from 110 to 80 feet; that while no lot shown on said plat was conveyed by reference thereto without reserving to the plaintiff in the deed therefor the right to change, alter or close said street, yet conveyances of property elsewhere in Myers Park were made in which this right was not reserved; that while various subdivisions of Myers Park have been platted and the plats recorded, and property in all cases conveyed by reference to the respective plats of the subdivisions in which the particular property is located, yet defendant contends that Myers Park is one single development and the various subdivisional plats, though physically separate, should be treated as constituting constructively a unit and as amounting together to one single map; and that, by reason of these facts, Morehead Avenue was irrevocably dedicated to street purposes immediately upon recordation of said original subdivisional plat of Block 11-A.

For this position the defendant relies upon *Collins v. Land Co., supra,* as a controlling authority. But we think there is a distinction between the *Collins case* and the one at bar. It appears from the agreed facts that the Stephens Company has made no conveyance of any lot on Morehead Avenue with reference to the original subdivisional plat on which that street was designated. It further appears that no conveyance of any lot shown on said plat was ever made in which the right to alter or close streets, not adjacent to the lots conveyed and not necessary to their full enjoyment, was not reserved specifically to the plaintiff in the deeds made by it, and that Morehead Avenue was not necessary to the full enjoyment of such lots thus sold in Block 11-A.

On the other hand, in the *Collins case,* the improvement company had the land laid off into city lots, separated by streets, and a plat thereof was made, upon which certain portions were designated as streets and others as lots. Thereafter, without reserving the right to alter or close any street, it proceeded to sell some of the lots with reference to this map. Later, an attempt was made to impeach and lessen the effect of the map mentioned in the conveyances of property and to which reference had been made in the deeds of sale. Under these circumstances it was held that the streets had been dedicated to the use of the public, and that the purchasers of the lots had acquired the right to have the same kept open. But this is not the case now before us, as will appear from the facts agreed.

Furthermore, Morehead Avenue was never opened or used as shown on the original subdivisional plat; but, as subsequently revised, constructed, and now existing, serves all necessary or useful purposes, and is wider than the average street in Myers Park or in the city of Charlotte.

The question then arises, Are all of these subdivisional plats to be regarded as a unit so that, after the recordation of one and the sale of lots thereby, all others thereafter recorded instantly become constructively a part of the first plat, and that no change may be made in the latter plats, even though there has been no conveyance by reference to the latter plats?

This, we think, must be answered in the negative under the facts and circumstances of the instant case, for each plat is in fact, and was designed to be, a separate, distinct and integral subdivision.

Moreover, it appears that no harsh or arbitrary action has been taken by the plaintiff and no unreasonable exercise of the reservations contained in its deeds is presented for consideration. Hence, upon the record, we think the plaintiff's position in this respect should be sustained.

It follows, of course, when one of these subdivisional plats has been recorded, and lots sold with reference thereto, the principles of estoppel and dedication then apply to the particular subdivision covered thereby.

2. Defendant further contends that Boulevard A, now Morehead Avenue, appears upon the "key map" as a curved street, whereas the said street, as actually located and as shown upon the revised subdivisional plat, is straight; that although said "key map" has never been referred to in the conveyance of any property in Myers Park, yet defendant contends it has been on record in the office of the register of deeds for Mecklenburg County, where it was open to inspection by any prospective purchasers of property who may have been, and doubtless were, influenced thereby; and that as soon as any property was sold in Myers Park, even though in all conveyances a particular subdivisional plat was referred to, all streets shown upon said key map were immediately and irrevocably dedicated to the purchasers and the public.

The correctness of this position must depend upon the character and purpose of the "key map." The plaintiff, as a matter of accommodation, and merely for the purpose of outlining in a general way its proposed development, and for convenience and assistance to attorneys in preparing abstracts of titles, caused to be made and spread upon the records a plat of its entire development, known and designated as a "key map." This map, while showing accurately the exterior boundaries of the entire tract, the boundaries of the various tracts purchased by the plaintiff, to make up its entire holdings, and, in a general way, the relative location and contiguity of blocks and lots within the various tracts and the general location of streets, yet it is not sufficiently definite in its details to furnish a correct description of any lot, block or street, and was neither intended nor used for the purpose of description or sale in the actual conveyance of property. In every instance, before any lot was offered for sale or conveyed, subdivisional plats of one or more blocks were made, giving in detail and with accuracy the description of all blocks, lots and streets adjacent thereto, and conveyances in all cases were made by reference to these subdivisional detailed plats. No reference has been made in any deed to this key map, and no sales were ever made by it. Hence it would appear that said map alone, considering the manner of its use, is not sufficient to effect a dedication of the streets shown thereon. "It is the offer of sale by the plat, and the sale in accordance therewith, that is the material thing which determines the rights of the parties." *Collins v. Land Co., supra.*

After a careful investigation of the entire record we think his Honor, *Judge Harding,* correctly decided the case in accordance with law and precedent.

It is proper to say that, in considering this appeal, we have found the excellent briefs filed by counsel on both sides of material aid and assistance.

Affirmed.

M. W. HINES ET AL. v. MRS. S. J. REYNOLDS ET AL.

(Filed 4 May, 1921.)

1. **Wills—Devise—Heirs—Fee Simple.**

While a devise is to the testator's son, "to him and his heirs forever," passes a fee-simple title to him without the use of restrictive expression, it will not be so construed when it appears from the interpretation of other language used in the will that he was only to take a defeasible fee.

2. **Same—Defeasance—Issue—Children—Estates—Remainders.**

Where a devise is to the testator's son "and his heirs," followed by the words that in the event he should die "without heirs," then to the testator's daughter "and the heirs of her body," the word "heirs," used in connection with the son, evidences the testator's intent, from the relationship of the devisees, that it should mean issue or children of the son, and the words "bodily heirs," used in connection with the daughter, as issue or children of the daughter, and upon the happening of the contingency after the death of the daughter, her issue or children will take the fee-simple title, to the exclusion of the heirs general of the son dying without issue.

3. **Same—Statutes—Descendible Interests.**

Under the provisions of Rules 1 and 10, C. S., 1654, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency.

4. **Wills—Devise—Estates—Remainders.**

Where the testator directs that two of his children, beneficiaries under his will, pay a certain sum of money to another of his children, and "no more," the intent of the testator is manifest that the other two children shall enjoy the remainder of the gifts to them.

APPEAL by petitioners in partition proceedings from *Finley, J.*, at June Term, 1920, of RICHMOND.

This is a proceeding for partition of land.

Both parties claim under Joseph Hines, who died in 1865, leaving a will.

In the first item of the will the testator devised all his property to his wife for life.

In the second item he devised all his land, after the death of his wife, to his son, John M. Hines, "to have and to hold to him and his heirs forever." He also gives in the same item all his negroes, to be equally divided between his son, John M. Hines, and his daughter, Elizabeth, stating that he had already advanced his daughter seven negroes, and said item closes with the following provisions: "In case of the death of my said daughter, S. Elizabeth, without heirs her surviving, all the negroes to her bequeathed shall vest in and become the property of my said son, John M. Hines, and his heirs; and in case of the death of my son, John M. Hines, without heirs him surviving, then all the property to him bequeathed, both real and personal, shall vest in and become the property of my said daughter, S. Elizabeth, and the heirs of her body, to her and their sole and separate use as aforesaid. I further bequeath to my said daughter, S. Elizabeth, upon the death of my wife, Sarah, two good beds and furniture and one common farm horse."

In the third item he gives his son, M. W. Hines, $400, to be paid equally by John M. Hines and his daughter Elizabeth in ten annual installments, and concludes this item as follows: "I make the above bequeath to my son, M. W. Hines, and no more."

The following facts were admitted:

"1. That said will was executed on or about 1861, and that testator died on or about 1865, and the will was admitted to probate soon thereafter.

"2. That testator left surviving him his widow, Sarah C. Hines, and three children, to wit: M. W. Hines, S. Elizabeth (Baldwin) (Robinson), and John M. Hines, and none others.

"3. That the widow died intestate about 1870.

"4. That M. W. Hines died intestate about 1877, and that plaintiffs are his lineal descendants.

"5. That S. Elizabeth died intestate in the year 1915, and that the defendants are her lineal descendants.

"6. That John M. Hines died in the year 1917 intestate and without ever having had issue.

"7. That John M. Hines, deceased, held the land described in the petition under the will of Joseph Hines, deceased.

"8. That the relationship as set out in the pleadings is admitted to be correct and that all parties in interest are before the court."

His Honor held that the defendants, who are the children and heirs of the daughter, Elizabeth, were the owners of the land, and entered judgment accordingly, from which the petitioners appealed.

A. R. McPhail and McIntyre, Lawrence & Proctor for plaintiff.
W. L. Spence, O. L. Henry and W. R. Jones for defendants.

ALLEN, J. It is manifest from an inspection of the whole will that it was the purpose of the testator to give to his son, M. W. Hines, out of his estate $400 and "no more," and that his son John and daughter, Elizabeth, should have and enjoy the remainder.

It is also clear that in the first part of item 2 the land in controversy is devised to John in fee simple absolute, and if there is nothing in the subsequent parts of the will changing this to a defeasible estate, the petitioners are the owners of one-half of the land as the heirs of John, since he left no lineal descendants.

The testator, however, imposed the limitation upon the devise to John that the land should become the property of Elizabeth and the heirs of her body "in case of the death of my son John M. Hines without heirs him surviving," and the present controversy depends on the proper construction of this clause.

The petitioners contend (1) that the words "heirs him surviving" mean "heirs" and not "children" or "issue," and that as John left heirs—the present petitioners and the defendants—the contingency upon which Elizabeth was to take has never happened, and that the estate of John was absolute and passed by descent to his heirs; (2) that if the word "heirs" means children or issue, the interest of Elizabeth until the death of John was contingent, and would not pass to the defendants by descent, and as Elizabeth died before John, this interest of Elizabeth lapsed.

Both positions are, in our opinion, settled against the petitioners.

On the first question the Court says, in *Pugh v. Allen*, 179 N. C., 309: "It has been held in several of our decisions construing deeds of similar import that, in case of a limitation over on the death of a grantee or first taker without heir or heirs, and the second or ultimate taker is presumptively or potentially one of the heirs general of the first, the term 'dying without heir or heirs' on the part of the grantee will be construed to mean not his heirs general, but his issue in the sense of children and grandchildren, etc., living at his death. *Sain v. Baker*, 128 N. C., 256; *Francks v. Whitaker*, 116 N. C., 518; *Rollins v. Keel*, 115 N. C., 68. In *Sain v. Baker, supra*, the testator devised the property to his son, and on the son's death, without heirs, to his daughters, the word heirs in this limitation was held to mean children, and the present Chief Justice, delivering the opinion, said: 'From the context it is clear that the words without lawful heir or heirs are used in the sense of dying without issue or children, otherwise the limitation over to the daughters would have been in vain.' And in *Francks v. Whitaker* a similar ruling was made, as follows: 'Where a testatrix devised land to her son for life, and after his death to his lawful heir or heirs, if any, and if none, to the children of another son, the words "heir or heirs" will be construed to mean his issue and not his heirs generally, and upon his death without issue the land goes to the children of the other son, all of whom were living at the date of the will.' "

The principle is applied to deeds and wills alike, and all of the conditions are present for its application in the will before us, as Elizabeth, the ultimate taker, was the presumptive heir of John, the first taker, and the word "heirs" must therefore be held to mean children or issue.

If so, did the interest of Elizabeth lapse because of her death before John, or did it pass by inheritance to her children, the defendants?

The same question was raised in *Lewis v. Smith*, 23 N. C., 146, in which, *Gaston, Justice*, says: "The second question raised is free from doubt. The interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends," and this principle has been affirmed.

See *Moore v. Barrow*, 24 N. C., 437; *Weeks v. Weeks*, 40 N. C., 117, and *Kornegay v. Morris*, 122 N. C., 199.

In *Kornegay v. Morris, supra*, a contingent executory devise was made to W. F. Kornegay, contingent upon the death of John J. Kornegay and Albert U. Kornegay, the first takers, without children. John J.

Kornegay had died without issue and W. F. Kornegay also died without children, leaving Albert U. Kornegay his sole heir at law. Albert U. Kornegay contracted to sell the lands devised under the will, and the Court held that the contingent interest of W. F. Kornegay vested in Albert U. Kornegay by descent.

Furches, Justice, delivering the opinion of the Court in the case, says: "The person (W. F.) being certain, but the event upon which his estate depends being uncertain, it was such a contingent estate as might be transmitted by descent. 2 Fearne Remainders, pp. 28, 30 and 433; *Fortescue v. Satterthwaite,* 23 N. C., 566. And W. F. being dead without issue, and leaving Albert U. his only heir at law, this contingent estate descended and vested in Albert U."

Rule 1, C. S., 1654, provides: "Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided." And Rule 12: "Every person, in whom a *seizin* is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance," thus recognizing that any interest in land belonging to a certain person may be transmitted by inheritance.

We are therefore of opinion the defendants are the owners of the land and that the petitioners are not entitled to partition thereof.

Affirmed.

ROAD COMMISSIONERS OF ASHE COUNTY v. BANK OF ASHE ET AL.

(Filed 11 May, 1921.)

1. Constitutional Law—Statutes—Local Law—Road Districts—Counties.

A public-local act incorporating road commissioners of a county, and giving them the powers, rights, duty and authority, as to the highways of that county, etc., that were formerly held by the county commissioners, does not contravene sec. 29, Art. II, of the State Constitution, in depriving the board of county commissioners of certain powers relating to the public roads therein.

2. Same—Bonds.

An act of the Legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene Art. II, sec. 29, of our State Constitution, prohibiting the Legislature from passing local, private or special act relating to the subject.

3. Same—Limitation of Issuance of Bonds in Series.

Municipal or district bonds for road purposes may be issued in the judgment of the proper authorities as and when needed, when the statute under which they are issued impose no limitation thereon, except as to the total amount, by requiring that it should not exceed a certain per cent of the assessed property valuation of the district.

4. Same—Notice to Purchasers of Bonds.

Where the proper authorities are given, under the statute, discretion to issue road bonds for a district as and when needed, not exceeding an amount to be ascertained according to a percentage of the assessed property valuation of the district, a provision in the order for issuing the bonds, that it was the first to be made, is notice that other bonds under the same power would thereafter be issued.

5. Constitutional Law — Road Districts—Counties—Municipal Corporations—Statutes—Amendments to Statutes—Elections.

An amendment to a former act authorizing a road district to issue bonds for road purposes upon the approval of the electors, which imposes additional expenditures and reduces the amount of the bonds to be issued, and is silent as to another election on the question, restores the authority of the former act, and the purchasers of the bonds may not successfully maintain that another election is essential to the validity of the bonds.

6. Same—Necessary Expenses.

The expenditure of moneys by a road district for its roads is for necessary purposes, and where bonds are authorized by statute to be issued with the approval of the electors of the district, an amendment to the act, which is silent upon the question of holding another election, cannot be construed to require it.

7. Elections—Polling Places—Electors—Presumptions—Notice.

Where polling places in each township of a road district have been established for a long time and are regarded as permanent, it will be presumed that each voter within the district knew where he should register and vote on the question of bonds, and where the notice of the election complied with the law except designating the exact location of these well-known polling places, the election will not be declared invalid solely on that account.

8. Municipal Corporations — Bonds — Maturity of Bonds — Statutes—Notice—Contracts.

A purchaser of municipal bonds, having a definite time fixed for their maturity, purchases with notice of the provisions of a statute authorizing their issuance, permitting the obligor to pay thereon within five years, or create a sinking fund, and he is bound by his contract: *Semble*, this question is only academic.

APPEAL by defendants from *Webb, J.*, at April Term, 1921, of ASHE.

This was a controversy without action. It appears from the case agreed that the plaintiff issued $300,000 road bonds, fixing the dates of maturity, for which the defendants agreed to pay par and accrued interest and a premium of $500. The plaintiff was incorporated, Public-

Local Laws 1919, ch. 467, and was vested with the powers, rights, duties and authority of the board of county commissioners with respect to the public roads of Ashe County, and was authorized to construct a system of highways for said county. By virtue of an election under said act, it was authorized to issue bonds not exceeding 15 per cent of the assessed valuation of property. Pursuant to said act, and under authority of said election, the plaintiffs issued and sold, on 6 May, 1919, $200,000 of road bonds. The personnel of the plaintiff board was increased by the act of 1921 which directed the construction of certain additional roads in the county and certain other disbursements; the 1921 act had been ratified after the entire issue of $200,000 previously sold had been expended and much more than that amount had been obligated upon contracts for the construction of said system of highways. Subsequent to the act of 1921, the plaintiff sold said $300,000 bonds now in controversy, said act of 1921 having limited the issuance of bonds to 5 per cent of the assessed valuation of property instead of 15 per cent, and it appears from the agreed statement of facts that under the said limitation a total of more than $865,000 could be assessed as authorized, and that there still remains a margin of $365,000 without exceeding the statutory limitation. The defendants refuse to receive and pay for the bonds upon the ground that they question the validity of the $300,000 issue.

The court entered judgment that the $300,000 bonds are in all respects a valid and binding obligation of the county of Ashe, and are not subject to recall and payment before the dates of their maturity, which were made absolute by the action of the plaintiff board.

W. R. Bauguess for plaintiff.
G. L. Park for defendants.

CLARK, C. J. The first objection of the defendants is to the constitutionality of ch. 467, Public-Local Laws 1919, which they claim violates sec. 29, Art. II, because it deprives the board of county commissioners of certain powers relating to the control of public roads; and their second objection raises the same point as to the amendatory act ratified 3 February, 1921, entitled "An act to amend the public road law of Ashe County, ch. 467, Public-Local Laws 1919," and also on the ground that it contravenes the section of the Constitution above cited and deprives the county commissioners of the exercise of such powers, and directs the expenditure of the fund upon certain particularly designed objects.

Both these questions have been considered and settled by repeated decisions of this Court. Chapter 467, Public-Local Laws 1919, contains no provision for the laying out, opening, altering or discontinuing any road or highway. The object of the act was to provide funds with which to build a system of highways for the county, creating a road commission to execute and supervise the details of constructing such system. The amendatory act of 1921, extending the powers of the road commission, directs the completion and construction of certain roads, and directs certain townships to be paid sums not exceeding amounts therein stated, to be used in connecting the townships with the county system. Neither of said acts contain any provision as to the laying out, opening, altering or discontinuing any road or highway, but merely provides the machinery for executing such work. The location of the roads is left to the judgment of the road commission. The provision of the Legislature for the application of the money arising from the sale of the bonds was clearly that the money "Should be distributed upon some fixed basis or according to a fixed rule, so that this equal apportionment might be better enforced." *Brown v. Comrs.*, 173 N. C., 598.

In *Mills v. Comrs.*, 175 N. C., 215, it is said, quoting *Brown v. Comrs.*, "It was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation for measures required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject." In the *Brown case* it was also held: "It is impossible to conceive that the purpose of the amendment was to deprive the General Assembly of the power absolutely necessary to aid counties and townships in the construction and repair of their public roads. The framers of the amendment no doubt intended to leave intact the long recognized and statutory power of the Legislature to supervise and control the financial affairs of the municipalities of the State." In *Comrs. v. Pruden*, 178 N. C., 394, the Legislature had authorized a certain bond issue and directed the expenditure upon certain designated projects, and it was held that the statute "only provided the means whereby the roads could be constructed and maintained in the most rational and equitable way for the general benefit of the county, and to this end the Legislature authorized the issue of bonds to raise the fund of $275,000, and required that it should be so appropriated to the different sections of the county as to give each one its fair share of the benefit to accrue. The framers of the Constitution certainly did not intend to withhold their sanction from so beneficial a scheme for road improvement."

This Court has repeatedly upheld acts incorporating boards of road commissioners, vesting in them the power to issue bonds and giving them full control over the construction, maintenance, laying out, altering, and discontinuing of roads and highways. *Comrs. v. Comrs.*, 165 N. C., 632, citing numerous cases, saying, "The Legislature has the authority to create a board of road commissioners and vest them with the authority over the roads that the county commissioners had theretofore possessed, quoting *Trustees v. Webb*, 155 N. C., 383, to the same effect, and saying that "the jurisdiction of the road commissioners in these matters is subject to regulation, in the discretion of the Legislature."

In *Hargrave v. Comrs.*, 168 N. C., 626, the Court held that the construction and maintenance of public roads are necessary public expenses, and that "the General Assembly may provide for construction and working the same, and may create a board to do this, distinct from the county commissioners," holding that all such matters are under the control of the Legislature.

The defendants' third contention is that the road commissioners are without authority to issue the bonds without a new election. It appears from the agreed case that an election was duly called. The order for the election stated that the vote was to be taken upon the issue of bonds as provided by chapter 476, Public-Local Laws 1919. Chapter 10 of said act provides that in the event that a majority of the votes cast at such election should be "for good roads," the commissioners, at their next meeting, shall proceed to carry out the wishes of the people as expressed in such election, and with as little delay as possible shall issue the bonds in such denominations and of such class and for such term as may be deemed best by said road commission. Section 9 provides: "Bonds may and shall be executed by the board of good roads commissioners, . . . provided that the maximum amount of bonds issued, together with all bonds previously issued and remaining unpaid by said county shall not exceed 15 per cent of the assessed valuation of the county." This gave the commissioners discretionary powers in the issuance and sale of bonds, but limited the maximum amount. There was no requirement that all the bonds should be issued at once, or in one series, or that all the bonds should be sold at once, for the commissioners did not know what amount would be needed to complete the system of roads required, and a great loss in interest might be incurred by issuing more than was necessary at any one time. The limitation being fixed by percentage on the assessed valuation, the only restriction was as to the limitation, leaving the amounts and times of issuance discretionary with the plaintiff board. The plaintiff board, in its order of bond issue, 6 May, 1919, provided: "This is the first issue of bonds under authority of said election; said election authorizing the issuance of such amounts as may be necessary, not exceeding 15 per cent of the assessed valuation." This gave notice that the board would issue on further series, and at that time contemplated an additional issue or series.

It is not unusual to fix the limit of indebtedness by bond issues by municipal corporations by a prescribed percentage of the assessed valuation. In 19 R. C. L., 978, it is held that "when the Constitution provides that the indebtedness of a municipal corporation shall not exceed a certain percentage of its total assessed valuation, the last assessment prior to the incurrence of the indebtedness is taken as a test; and even where the validity of the indebtedness is made to depend upon the assent of the voters, it is the assessment prior to the incurrence of the indebtedness and not an assessment prior to the election that is taken into consideration. Such provisions do not prevent the incurring of a new indebtedness if the total of indebtedness, old and new, does not at any time exceed the limit." In 28 Cyc., 1600, it is said: "A statute providing that municipal officers shall issue bonds within a certain number of days after an election authorizing such issue does not imply that they may not issue them after the time specified; and the fact that municipal bonds were not issued until nearly two years after the passage of an ordinance making a provision for their payment does not invalidate them."

In this case, even if the authority to issue bonds within a time prescribed had passed, the act of 1921 would restore the authority. Taking into consideration the increase in the valuation of property since the election was held on 19 April, 1919, the Legislature, by the act of 1921, amending the previous act, restricted the totality of the bonds to 5 per cent of the assessed valuation for 1920 instead of 15 per cent.

The defendants contend, however, that even if the authority was restored by the act of 1921 that the Legislature in the latter act contemplated another election to be held after its passage, but there is no reference to any election, and the act limits the amount of bonds rather than extends it. At the date of the ratification of the act of 1921 all of the first issue of $200,000 bonds had been expended, and the work contracted for required as much more. Knowing that there were no funds in the hands of the road commissioners with which to carry on the work of completing the system of highways, the Legislature directed that certain additional roads be constructed as a part of the county system, and that certain sums be paid to certain townships for township purposes. The commissioners are commanded to extend the work, thus increasing the indebtedness to complete the system of roads provided for in the act of 1919. This being a necessary expense, the county commissioners were authorized to incur it even if the authority under the original act had ceased, and should the act of 1921 not restore such authority, if already lapsed, it would have been necessary to issue the additional bonds to carry out the mandate of the Legislature as was held in *Bradshaw v. High Point,* 151 N. C., 517, and *Smathers v.*

Comrs., 125 N. C., 480, and other cases. The commissioners would be authorized to issue bonds to complete the system of roads for the county being authorized to incur indebtedness in the construction of a certain system of roads, this being a necessary expense authorized by the statute and by the popular vote.

The fifth objection of the defendants is that under the authority of *Comrs. v. Trust Co.*, 164 N. C., 301, the names of the voting places in every precinct or township must be given. Chapter 467, Public-Local Laws 1919, provides that "the election shall be held in the same manner as prescribed by law for holding elections for the General Assembly." In the agreed case it is stated that the polling places in every township were well known to all electors, and that there is only one polling place in every township or precinct. The order for the election contained the following notice: "The registry books of the various townships in the county shall be open 29 March, 1919, for the registration of the electors of the county, to remain open as required by law for the registration of the electors for the election of representatives to the General Assembly." This was followed by the names of all the townships, giving the names of the registrars and judges in each for the respective townships. It is admitted that these polling places were fixed and permanent and well known, and that the election was held under the general laws which could be changed only according to C. S., 5926, after due inquiry and notice fully given. The presumption is that each elector knew where the polling place was in the precinct in which he was entitled to vote.

The sixth exception is that though the dates of the maturity of the bonds were fixed, yet under the provisions of the statute the commissioners may within five years after the issuance of the bonds begin their payment, or the creation of a sinking fund, for the payment of the principal at maturity. The defendants admit in their answer that this provision in no wise affects the validity of the bonds, and as they agreed to take them knowing of this option on the part of the debtor to begin payment within five years, they cannot be heard in repudiation of their agreement to take the bonds. The present board cannot estop the option which, under the statute, they or their successors may exercise. The probability of the payment of bonds before maturity by a progressive community constantly needing funds for public improvements is so remote as to relegate this objection as an almost purely academic question.

We think that the $300,000 of bonds for which the defendants contracted were legally issued under authority of law, and of an election properly held, and are in all respects valid and binding obligations of the county of Ashe.

Affirmed.

J. A. LONG v. CLEMMIE CROMER ET AL.

(Filed 11 May, 1921.)

Arbitration and Award—Limit as to Time—Courts—Extension of Time.

Where, pending the action, the parties thereto, *ex curia*, enter into an agreement to arbitrate so as to conclude them all, and therein specifically state the time limit in which it was to be consummated, and that it was for the purpose of having a judgment signed by the judge at a certain term of the court upon the award entered, the court is without authority at the term stated, upon his finding that one of the selected arbitrators refused to serve, to order that the case be referred again to the same arbitrators to act under the agreement, fixing the term for final disposition, and refusing a motion of a party to place the case again on the trial docket.

APPEAL by plaintiff from *Ray, J.*, at November Term, 1920, of STOKES.

Civil action to recover damages for an alleged breach of a written contract to convey land.

After the institution of this suit, and while the same was pending, complaint and answer having been filed, the parties voluntarily entered into the following agreement:

In this cause it is agreed between the parties that the whole matter in dispute, law and fact, be submitted to W. J. Wall, N. S. Jones, and Luther Baker as arbitrators.

The award of said arbitrators, or a majority of them, to be final, and when filed to become a rule of court. The parties to this instrument hereby further agree that the judge of the Superior Court shall sign a judgment at the next term based upon said award.

They hereby further agree to execute bond in the sum of $2,000, payable to the adverse party, the stipulations of said bond being that they will abide the award of the arbitrators and the judgment of the court rendered thereon.

It is further agreed that 29 September be fixed for taking testimony before the arbitrators herein named, to the end that the report may be filed in time for a judgment to be rendered thereon at the next term of the Superior Court of Stokes County, which convenes 1 November, 1920.

It is further agreed that in the event the arbitrators desire to view the land in person, before rendering their award, they are by this agreement permitted to do so. It is further agreed that, notwithstanding what the award may be, each party agrees to pay one-half of the cost of the arbitration.

J. A. LONG, [SEAL]
Plaintiff.
CLEMMIE CROMER, [SEAL]
JOSEPH H. CROMER, [SEAL]
Defendants.

Witness: W. H. BECKERDITE.

In an effort to carry out said agreement, the parties and their counsel met on two different occasions before the November Term, 1920; but at both times they were unable to go into a hearing on account of the absence of one of the arbitrators. Whereupon, at the said November term the plaintiff gave notice of withdrawal of his consent to arbitrate, and moved to have the case set for trial at the next term of the Superior Court. This motion was overruled; and the court, *ex mero motu,* entered the following order:

"This cause coming on to be heard upon motion of plaintiff to strike out the agreement to submit the matter in controversy to arbitration and place the cause upon the docket for trial at the next term of the court, and it appearing from the agreement to arbitrate the matters in controversy between the parties that 'the award of said arbitrators, or a majority of them, to be final, and when filed to become a rule of the court.'

"The court concludes from this clause in the agreement that the agreement to arbitrate the matters in controversy was consented to by the parties under the supervision of the court, and it appearing that the arbitrators have failed to hear the matter and make any award in the case, and the plaintiff stating in open court that he withdraws his consent given in the order to arbitrate the matter, and refuses the right to allow the matter to be proceeded with, it is ordered by the court that the motion that the case be upon the trial docket of the calendar to the next term of the court be disallowed, and that the case be heard and determined by the arbitrators hereinbefore selected by the parties and named in the order, the court finding as a fact that one of the arbitrators refuses to serve as such.

"And that a copy of this order be certified by the clerk of this court to W. J. Wall, N. S. Jones, and Luther Baker, arbitrators, to proceed to hear and return the matter, and to return the award and further findings to the next term of this court.

"To this order and findings the plaintiff gives notice of appeal in open court. Notice waived. Appeal bond fixed in the sum of $35, adjudged sufficient.

"The record proper, together with a copy of the agreement to arbitrate and a copy of this order to constitute the case on appeal to the Supreme Court.

J. BIS RAY,
Judge Presiding."

To the foregoing order plaintiff excepted and appealed.

McMichael & Johnson for plaintiff.
J. D. Humphreys and N. O. Petree for defendants.

STACY, J. It was stated upon the oral argument that while the agreement to arbitrate commenced with the words, "In this cause it is agreed," yet as a matter of fact said articles of agreement were never filed as a part of the record in the Superior Court. It also appears, from the face of the instrument, that the award of the arbitrators, or a majority of them, was to become a rule of court only when filed, and then it was to be a final settlement of the whole matter in dispute. And further, the date for taking testimony before the arbitrators was fixed "to the end that the report (award) might be filed in time for a judgment to be rendered thereon at the next term of the Superior Court of Stokes County, which convenes 1 November, 1920." Thus it would seem that the agreement to arbitrate was made *ex curia* and purposely limited as to time. Under these circumstances we think his Honor was without authority to enter the order which forms the basis of plaintiff's appeal.

This is not a suit to enforce an arbitration agreement, but to recover damages for an alleged breach of contract to convey land. The agreement to arbitrate was entered into *pendente lite* in an effort to expedite a hearing and to end the litigation. Failing to accomplish this result within the specified time, both parties were at liberty to treat the instrument as no longer binding and at an end.

We refrain from entering upon a discussion of the principles of arbitration and award, which were argued on the hearing, as we do not think they arise upon the record in this case. The order directing the arbitrators to proceed will be set aside, and the parties will take such further action as they may be advised.

Error.

NORTH CAROLINA PUBLIC SERVICE COMPANY, THE CITY OF GREENSBORO, AND THE CITY OF HIGH POINT v. SOUTHERN POWER COMPANY.

(Filed 11 May, 1921.)

1. **Removal of Causes—Pleadings—Change of Nature of Original Cause.**
   Where a cause of action has been brought in the State court and is not then removable to the Federal Court, it may thereafter become so if the pleadings have been changed as to so affect the nature of the original suit as to bring it within the Federal Removal Act.

2. **Same—Restraining Order—Injunction.**
   The application for a temporary restraining order is merely ancillary, incidental, and auxiliary to the original suit, and where the original suit is not removable under the Federal acts, it does not become so merely because a restraining order has thereafter been applied for and obtained therein.

3. Corporations — Public-service Corporations—Discrimination—Credit—Issues—Questions for Jury—Trials.

Where mandamus is sought to compel a public-service corporation to furnish its goods or products to the plaintiff without discrimination, and the pleadings set at issue the question as to whether the plaintiff was ready, able, and willing to pay a reasonable rate therefor, a question of fact is raised for the determination of the jury, the law not requiring a public-service corporation or any other to sell its goods or products to an insolvent concern on a credit.

4. Appeal and Error—Stare Decises—Law of the Case.

The decision of the Supreme Court is the law in the particular case decided unless changed in the course and practice of the courts.

APPEAL by defendant from *Ray, J.*, at December Term, 1920, of GUILFORD.

This is a controversy pending in the Superior Court of Guilford County wherein the plaintiffs filed petition for a writ of mandamus, praying that the defendant be required to furnish electric current and power to the plaintiff, North Carolina Public Service Company, through its substations at Greensboro and High Point, for use in operating the street-car lines in both of said cities, and for the use and benefit of the municipalities and the citizens thereof for light and power, as is now being furnished.

In apt time the defendant, observing the requisite formalities, filed a petition for removal of the cause to the District Court of the United States for the Western District of North Carolina. This motion for removal was denied, and the ruling was affirmed on appeal. The defendant then filed an answer to plaintiffs' petition, joining issue upon the merits of the case.

Thereafter plaintiffs applied to the court below for a temporary injunction, as ancillary to the original proceeding, which was granted and made returnable at Greensboro on 14 December, 1920. Prior to said return date, the defendant filed a second petition and bond, again asking that the case be removed to the Federal Court. This was denied, and defendant gave notice of appeal.

Plaintiffs then moved for judgment on the pleadings, which was allowed. Defendant excepted and appealed.

Brooks & Kelly for Public Service Company.

C. A. Hines for city of Greensboro.

Dred Peacock for city of High Point.

Cansler & Cansler, Broadhurst & Cox, W. P. Bynum, and W. S. O'B. Robinson, Jr., for defendant.

STACY, J. This case was before the Court at a former term, and is reported in 180 N. C., 335. The single point presented for consideration at that time was the mooted question of the defendant's right to have the case, as then instituted, removed to the Federal Court for trial. The decision on the first appeal was adverse to the defendant's contention, and has now become the law of the case, so far as the State courts are concerned, unless the condition of the pleadings has been so changed as to affect the nature of the original suit. *Fritzlen v. Boatmen's Bank,* 212 U. S., 364. It is well settled and not disputed that a case, nonremovable in character when commenced, may become removable thereafter at a later stage. *Great Northern R. Co. v. Alexander*, 246 U. S., 276; *Ayers v. Watson*, 113 U. S., 594; *Powers v. Chesapeake & O. Ry. Co.,* 169 U. S., 92.

The defendant's initial motion for removal was denied upon the ground that a proceeding, in conformity with the State statute, for a writ of mandamus was not a suit "of a civil nature, at law or in equity," which could be removed from the State to the Federal courts. A direct authority for this position is to be found in the case of *Rosenbaum v. Bower*, 120 U. S., 450, where it is stated in the syllabus: "An original proceeding for a mandamus is not a suit of a civil nature within the meaning of the Removal Act of 3 March, 1875, and is not removable."

The defendant's second petition for removal presents the question as to whether the plaintiff's application for a temporary injunction, as an ancillary remedy, works such a change in the original proceeding as to bring it within the terms of the acts of Congress making it removable to the Federal Court. We concur in the judgment of his Honor below that it does not. *Freeman v. Howe*, 65 U. S., 450.

The application for the restraining order was made in this cause, and is merely ancillary, incidental, and auxiliary to the original suit. Its purpose was to maintain the existing status until the legal and statutory rights of the parties could be determined. The action is still a proceeding for a writ of mandamus. The pleadings have not been changed, neither have the parties. Hence, we think the defendant's second petition for a removal was properly denied. *State v. Assurance Company of America*, 251 Mo., 278; 46 L. R. A. (N. S.), 955; *First National Bank of Alexander v. Turnbull*, 16 Wallace, 190; *Brooks v. Clark*, 119 U. S., 502.

We are of the opinion, however, that his Honor erred in granting the plaintiffs' motion for judgment on the pleadings. Among other controverted facts it is alleged in the complaint and denied in the answer "that the plaintiff public service company is ready, able, and willing to pay the power company a reasonable rate for all power and current required of it at Greensboro and High Point, and stands ready to continue to take same, if it is furnished without discrimination as to rates and service."

The denial of this allegation raises a question as to the relative rights of the parties, which cannot be overlooked. The law will not require a public-service company, or any other, to sell its goods or products to an insolvent concern. A public business is not necessarily charitable or eleemosynary. Of course we know nothing of the merits of this particular fact in issue, nor whether it is raised in good faith, but it is squarely joined in the pleadings and arises upon the plaintiffs' own allegation.

There are other controverted matters appearing on the record, but we need not consider them now, as they may be adjusted satisfactorily on trial or by agreement, as is often the case in matters of this kind.

Let the judgment of the Superior Court be set aside; and the parties will proceed as they may be advised.

Error.

WALKER and ALLEN, JJ., concurring: We concur because the former decision in this case, to which we did not agree, is the law of the case, and because we understand that, under the present opinion, all issues of fact raised by the pleadings, including the question as to whether the plaintiffs are competitors of the defendant, are referred to a jury.

W. P. INGRAM ET AL. v. YADKIN RIVER POWER COMPANY.

(Filed 11 May, 1921.)

1. **Appeal and Error—Record—Settlement of Case—Signature of Judge—Agreed Statement.**

In order that a case on appeal may be considered, the record should contain a proper statement of the case sought to be determined in the Supreme Court, which is fatally defective unless there is an agreed case properly set out in the record, or where the judge has not signed what purports to be the case he has settled for the parties.

2. **Appeal and Error — Record — Statement of Case — Contention of Counsel.**

Matters in dispute between the appellant and the appellee as to admissions or agreements will not be considered by the Supreme Court on appeal, it being required that the case on appeal, properly presented, shall determine all such matters, and not a verbal controversy between counsel.

3. **Same—Case Remanded.**

Held, the record not being altogether clear as to certain facts occurring on the trial in this case, it is remanded to the Superior Court for the appellant to request the judge, who presided at the trial, to fix a time and place for the hearing, so that he may find the material facts disputed at the hearing, if such may be desirable or possible.

4. Same—Printing—Supplemental Order.

Where a case on appeal is remanded to the Superior Court judge to make the case more definite or more full as to matters disputed in the Supreme Court, this Court may not require the entire record to be printed again if found to be correct, for in such event a supplemental order may suffice.

APPEAL by plaintiffs from *McElroy, J.*, at first September Term, 1920, of RICHMOND.

Civil action to recover damages for alleged ponding of water against and sobbing lands of plaintiffs by reason of defendant's concrete dam and flash dam at Blewett's Falls on the Pee Dee River. There was a verdict and judgment in favor of the defendant. Plaintiffs appealed.

Stack, Parker & Craig and W. R. Jones for plaintiffs.

Robinson, Caudle & Pruitt, Thomas & Phillips, F. W. Bynum, James H. Pou, and W. L. Currie for defendant.

STACY, J. The record contains no proper statement of case on appeal. The case, as settled by the trial judge, is not signed by him; and there is no agreed statement of the case. This was a matter of procedure to which the appellants should have given proper attention. C. S., 642, 643, and 644; *Holloman v. Holloman,* 172 N. C., 835; *Gaither v. Carpenter,* 143 N. C., 241; *Stevens v. Smathers,* 123 N. C., 499.

Upon the argument it developed that there is a difference between counsel as to what contentions, if any, were abandoned by plaintiffs during the trial in the Superior Court with respect to the alleged damages resulting from the concrete dam. On this point the record is not altogether clear. In *Gaither v. Carpenter, supra,* it was said: "The case on appeal should contain such incidents of the trial as were duly excepted to. What those incidents were is a matter which, if not agreed upon by counsel, must be settled by the trial judge, and cannot be determined by this Court." It should also contain a statement of what admissions, if any, were made by the parties during the progress of the trial, if said admissions are deemed to be material.

It is well understood that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. *Hill v. R. R.,* 178 N. C., 612; *Lindsey v. Mitchell,* 174 N. C., 458. Especially is this so where the change of front is sought to be made between the trial and appellate courts. *Webb* *v. Rosemond*, 172 N. C., 848; *Coble v. Barringer*, 171 N. C., 445. We do not intend to say, or intimate, that such is the case here. It is one of the mooted questions which was argued on the hearing, and we do not know how it is. Neither do we mean to suggest that the point was raised in a proper manner at the time the case was "settled," nor even, if established, would be a controlling or material fact in the case at bar. We only give the parties an opportunity to have the matter determined if they are in position to do so, and consider it worth while.

The cause will be remanded to the end that a proper statement of the case on appeal may be had, including a finding by the judge, if desirable, and a more definite one can be made, touching plaintiffs' alleged abandonment of claim for damages resulting from the concrete dam. The appellants, being the moving parties, will request the judge to fix a time and place for the hearing.

It will not be necessary to have the entire statement of case on appeal reprinted if the present record is found to be correct. In such event a supplemental order will suffice.

Remanded.

ORMAND MINING COMPANY v. GAMBRILL AND MELVILLE MILLS COMPANY ET AL.

(Filed 11 May, 1921.)

1. Deeds and Conveyances—Timber—Reservation of Title—Conditions—Notice.

A grantor of lands reserving "all wood and timber" thereon, with provision that should the grantee divide the lands into the lots the reserved right would cease "after any building is begun," is required to give a reasonable notice of the time the reservation shall expire, when no time limit therefor is specified.

2. Same—Equity—Cloud on Title—Suits.

Where the grantor of lands has reserved the right to the timber growing thereon, but this right to cease if the grantee divide the lands into lots and erect buildings thereon, and the grantee, after reasonable notice to cut the timber has not done so on all of the lots, his claim of right to continue the cutting as to these remaining lots is a cloud upon the grantor's title, which he may have removed in his suit for that purpose.

3. Deeds and Conveyances—Timber Deeds—Expiration of Time Limit—Injunction—Equity.

An order perpetually enjoining a grantee in a deed from cutting timber upon land after his right has ceased is a proper one in a suit by the owner to remove the grantee's claim of right as a cloud upon his title.

4. Appeal and Error—Supreme Court—Equity—Bill of Peace—Pending Suits—Injunction—Statutes.

A judgment of the Superior Court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon defendant's appeal, actions pending in the Superior Court involving the same equity and the same subject-matter, where the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. C. S., 1412.

APPEAL by defendants from *Bryson, J.*, at September Term, 1920, of GASTON.

S. J. Durham for plaintiff.
C. E. Whitney and A. G. Mangum for defendants.

CLARK, C. J. The plaintiff holds under *mesne* conveyance from one Pinchback, whose deed to the plaintiff's grantor contains the following reservation: "All the wood and timber is reserved by me," with the addition that if the grantee should "divide up the land referred to into lots and begin the erection of any building on any lot, then I shall have no further right to any timber on *said lot* after any building is begun." This deed and reservation was before us in *Mining Co. v. Cotton Mills*, 143 N. C., 307, and we there held that, "Where land is conveyed in fee, with the exception of the reservation of the timber, if a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or expiration of the time—as here, upon beginning the 'erection of any building upon any lot.' If there is no limitation to indicate when the reservation or exception shall expire, then the grantee must give notice for a reasonable time that the grantor must cut or remove the timber agreed in his reservation, and if this is not done after such reasonable notice, then the reservation or exception falls, and all rights thereunder cease and determine." The Court further said: "Whether the right to cut timber is a grant or a reservation, it expires at the time specified. When no time is specified, a grantee of such right takes upon the implied agreement to cut and remove within a reasonable time. He has bought the timber for that purpose, whereas, when a grantor of the fee reserves or excepts the timber he is not providing for timber cutting, but reserving a right, and should be entitled to hold until this is put an end to by the grantee giving notice for reasonable time so that the grantee may elect to cut, or sell this right to another."

It is further said: "In this contract, the event upon which the reservation should terminate is stipulated for, and is when the land is divided into lots and the erection of any building is begun on any lot, then the grantor 'shall have no further right to any timber upon the said lot,' and in that case it was held that, 'The plaintiff could not recover of the defendant, who is assignee of the reservation for timber cut on any lot before the happening of the event which it was agreed should put an end to the reservation.' "

In this action the jury have found that "the defendants have exercised their right upon the lots in question, and that the plaintiff gave the defendants notice on 29 December, 1914, to cut and remove such wood and timber as were included with said reservation; and that the time which elapsed from the date of said notice to the institution of this action (8 January, 1918), was reasonable time for such cutting and removal, and that the defendants' claim under said reservation is a cloud upon the plaintiff's title to said land."

When this matter was here before, 143 N. C., 307, a different proposition was involved. The decision in this case is in no wise contradictory to that, for not only the contingency has happened, which had not then occurred, and the jury finds that the defendants have exercised their right by cutting the timber on the lots in question which belonged to them, under the reservation, but in addition that the plaintiff gave the defendants notice and reasonable time to cut and remove the timber, and it follows that the reservation has now lapsed, and the plaintiffs are entitled to have the cloud, cast by the reservation upon their title, removed.

The judgment of the court herein decrees that "the plaintiff is owner of the land described, and is owner of the wood and timber now thereon, and that all rights of the defendants under the reservation of the wood and timber have expired and perpetually enjoined the defendants from asserting any title or claims to said wood and timber under said reservation, and from doing any act or thing to disturb the quiet possession by the plaintiff of the said lands and the wood and timber being thereon, and from instituting any action upon a cause of action growing out of the reservation of the wood and timber against the plaintiff or its grantees." In the proceedings and judgment we find no error.

The appellee moves in this Court as a modification of the judgment in the court below that the plaintiff in the several actions enumerated in the complaint be enjoined from further prosecution of those actions, because this being an action in equity to quiet the title and the several actions therein mentioned as shown by the complaints attached as exhibits to the plaintiff's complaint in this action grow out of the timber and wood reservation herein referred to, and such actions are numerous and are based upon the interpretation of the clause of reservation in this deed.

All the plaintiffs in those actions, as we understand it, have been made parties to the case at bar. The judgment herein is decisive of the rights of the parties in all such actions, and we think the plaintiff is entitled to such modification of the judgment in the nature of a bill of peace. Although the plaintiff has not appealed, it is proper that the Court should render such judgment as "upon an inspection of the whole record ought in law to be rendered." C. S., 1412, and notes thereto.

No error.

TOWN OF MORGANTON v. H. L. MILLNER AND C. T. CAIN.

(Filed 11 May, 1921.)

1. **Actions—Indebitatus Assumpsit.**

In the absence of a special contract, or unless in contravention of some principle of public policy, whenever one man has been enriched or his estate enhanced at another's expense under circumstances that in good conscience call for an accounting between them, the common-law action of *indebitatus assumpsit* may ordinarily be maintained against the wrongdoer for the amount shown to be justly due.

2. **Same—Account Stated—Contracts—Fraud—Mistake.**

Where men who have had business dealings with each other have come to a full accounting and settlement purporting to cover transactions between them, such adjustment has the force and effect of a contract, and may not be ignored or impeached except by action in the nature of a bill in equity to surcharge or falsify the account for fraud or specified error.

3. **Same—Taxation—Municipal Corporations.**

Where a city brings action against a taxpayer and its former manager presenting the question as to whether the taxpayer has paid his taxes, or whether the manager had collected them and failed to account to the city, and there is evidence tending to show that an accounting had been had between the duly accredited agent of the city, acting in its behalf, and its manager, including the amount in suit, the principles relating to an account and settlement apply.

4. **Courts—Jurisdiction—Justices of the Peace—Appeal—Superior Courts—Equity.**

The courts of justices of the peace have no jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor will the Superior Court acquire such jurisdiction on appeal.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at the October Term, 1920, of BURKE.

Action heard on appeal of plaintiff from a justice court to the Superior Court.

The plaintiff complained and seeks to recover $42.75, alleged to be due plaintiff for nonpayment of $42.75 taxes due from defendant Millner and wife for year of 1916, and "which had been placed in the hands of defendant Cain as manager of the town of Morganton with authority to collect same, and which had never been accounted for or charged to him in his settlement with plaintiff as such town manager. Though plaintiff is informed and believes that said taxes were paid to said defendant Cain by his codefendant, H. L. Millner and wife, and were left out or overlooked from said settlement as items to be charged against said defendant by mutual mistake of the parties." Defendant Millner denies liability, and alleged full payment of $42.75, the amount due for taxes for 1916. Defendant C. T. Cain denies liability, and alleges full and complete accounting for the special sum, and for all other sums due the town of Morganton by virtue of his office as town manager. The facts in evidence tended to show that Millner and wife had paid the taxes to Cain, and that he had turned the same into the town treasury. There was further evidence to the effect that in spring of 1917, with a view of going out of office and turning the books and affairs over to his successor, the defendant Cain had an accounting and settlement of the taxes, etc., and other moneys coming into his hands amounting to $30,000 to $35,000; that the accounting was made by Mr. E. B. Claywell, official auditor appointed by the board of aldermen for the purpose, a balance struck, and the amount paid according to the settlement showing that the amount was something like $2, witness did not recall whether in favor of the town or defendant Cain, but whichever way it was the amount was paid, and later the settlement was approved by the board of aldermen and ordered recorded, and this was done. It further appears that in making the settlement referred to there was a mistake made in that defendant Cain was not charged with the Millner taxes. At the close of the testimony, the court being of the opinion that plaintiff could not recover in the present action in deference to such opinion, plaintiff submitted to a nonsuit, and judgment being so entered, excepted and appealed.

Avery & Ervin for plaintiff.
No counsel for defendant.

HOKE, J., after stating the case: It is recognized in this jurisdiction that in the absence of a special contract, or unless in contravention of some principle of public policy, wherever one man has been enriched or his estate enhanced at another's expense under circumstances that in good conscience call for an accounting between them, the common-law action of *indebitatus assumpsit* may ordinarily be maintained against the wrongdoer for the amount shown to be justly due. *Sanders v. Ragan,* 172 N. C., 612, and authorities cited. There is, however, another principle equally wholesome, and as fully established with us that where men who have had business dealings with each other have come to a full accounting and settlement purporting to cover the transactions between them, such adjustment has the force and effect of a contract, and may not be ignored or impeached except by action in the nature of a bill in equity to surcharge or falsify the account for fraud or specified error. *Williamson v. Jones,* 127 N. C., 178; *Suttle v. Doggett,* 87 N. C., 203; *Costin v. Baxter,* 41 N. C., 197; *Mebane v. Mebane,* 36 N. C., 403; *Pratt et al. v. Weyman et al.,* 6 S. C. Equity, 89; 4 Pomeroy's Equity (3 ed.), sec. 1421; Bispham's Equity (9 ed.), secs. 485-486. In *Williamson v. Jones, supra,* the present *Chief Justice* speaking to the question said: "The statute is explicit, and, even in the absence of the statute, it would have been necessary, in order to impeach the account audited and settlement made by the county commissioners, to have averred fraud, or set up specially the errors assigned." In *Suttle v. Doggett, supra,* it is held "that an account stated and settlement made between the parties (here a county and its tax collector) have the force of a contract, and operate as a bar to a subsequent accounting, except upon a specific allegation of fraud or mistake." In *Costin v. Baxter, supra,* the principle and one of the controlling reasons for it is stated by *Pearson, J.,* as follows: "When an account settled is relied on, by way of plea or answer to a bill for an account, it is conclusive unless the plaintiff can allege and prove some fraud or mistake; for, otherwise, he has already had that which he asks by his bill, having made a settlement, and thereby perhaps induced the other party to destroy or surrender his vouchers. It would be most mischievous to allow the settled account to be set aside, unless from urgent reasons." It could not at all be maintained that this is not an account and settlement coming under the effect and influence of the principle. The facts in evidence show that it was a full accounting by defendant Cain, the former town manager, with the official auditor of the town designated for the express purpose by the board of aldermen and put upon the public book of accounts and payment made pursuant to its findings. The witnesses refer to it as the settlement had with the town manager, and plaintiff's principal witness, and all of the witnesses, refer to it as the settlement had with the town manager. This being true, such account can only be impeached, as stated, for fraud or mistake duly specified and proven, and to be enforced by civil action in the nature of an original bill in equity, and the justice of the peace where the suit originated being a common-law court, having no jurisdiction of such causes, the action, under our decisions, has been properly dismissed.

Cheese Co. v. Pipkin, 155 N. C., 394; *Wilson v. Ins. Co.,* 155 N. C., 173; *Dougherty v. Sprinkle,* 88 N. C., 300.

We find no error to appellant's prejudice, and the judgment of nonsuit entered against him is approved.

Affirmed.

CLARK, C. J., dissenting: The plaintiff is already in the Superior Court, and there are three reasons, each good and sufficient, why the plaintiff should not be dismissed out of that court and compelled to come back into the same court at heavy expense to litigate identically the same question.

1. This action is to recover $42.75, which was paid by H. L. Millner to the defendant Cain, the tax collector of the town of Morganton, but which it is alleged the collector did not pay over to the town of Morganton. It is not denied that Millner paid this tax to the said Cain, and the sole issue is whether Cain has paid it over to the town of Morganton.

The plaintiff put in evidence the tax list for Morganton for the year 1916, showing that Millner owed $41.90; that Cain, as collector, had charge of the book for the collection of taxes, and it appears therefrom that his total taxes, including cost, was $42.75.

The auditor for the town testified that when he settled with Cain for the taxes of 1916 this matter of Millner's taxes was left out of the settlement, Cain being given credit for those receipts because those taxes had not been collected. "He was charged with them originally," says the auditor, "but he was credited with the receipts still in the book, and the difference was the cash that he ought to have had in hand. He ought to have had $40 and some odd dollars more than he had, but he never accounted for those taxes in his settlement with us. I remember the day he made the settlement. There was something said about those receipts the day I made that audit, but just what it was I do not know; the subject was brought up. The receipts were still there (in the stub book), and I could not do anything in the world but credit or charge Mr. Cain with it, because he could not show they were paid. The way I was doing it amounted to a credit. I charged him with everything that was on the book, and credited him with the receipts that were still in the book. I charged him up with the amount he was chargeable with, and then I gave him credit for such receipts for taxes as it appears he had not collected, and the balance I charged up against him in favor of the town." From this it would appear that this was not a full settlement by the defendant with the town, but simply crediting the defendant with the money he had paid into the town treasury, and crediting him also with the receipts still in the book which he had not torn out and delivered to parties on payment of taxes. This action, therefore, is not to surcharge and falsify an account, but the plaintiff was proving that this sum had not at that time been paid by Millner as the receipt for the taxes was still in the stub book, and hence that item was not erroneously omitted, but was not taken into the settlement at all. Cain did not produce any receipt in full from the town showing that he had paid up, and the auditor's evidence showed that by the settlement then made Cain received credit for the $42.75 as uncollected. This action, therefore, is a plain action of debt to recover from Cain a certain amount which at the settlement he did not claim he paid over, but was credited with it as unpaid, the receipt for the same being still in the stub book.

Whether this was correct or not was a matter which the jury should have settled, and not the judge. The action was properly brought before the justice of the peace, and by appeal it came to the Superior Court. If there was any equitable element it is solely in there being an omission by mistake to include the Millner taxes in the settlement, but the plaintiff's testimony denies this, and Cain's defense is that he actually paid over to the town the $42.75, which he admits he collected. If either is right, there was no omission by mistake, and no possible equity involved, and the jury should have been allowed to settle it.

The plaintiff's testimony is that there was no mistake, for that the Millner taxes were purposely omitted because the receipt therefor was still in the tax-collector's book, and he was charged only with the cash he had collected at that time.

Whichever contention is right there was no mistake, it is simply a question of fact—Cain saying he had paid and the plaintiff saying he had not—a pure issue of fact, of payment or no payment, which a jury must settle, which it was then empaneled to settle and should have settled without all this needless countermarching. The plaintiff was seeking only to recover $42.75 (which the opinion says appears now not to have been included in the amount paid to town), and was doing no wrong, but only its duty in seeking to get the $42.75 paid up. Yet it is penalized with the costs before the justice, with the costs in the Superior Court, and with the costs of this Court! To what end and for what possible benefit to any one? There is certainly no equity in this.

The defendant produced no receipt in full from the town, and if he had a receipt it would be only *prima facie*, and even in the old days when technicalities were the delight of judges could be disproved in a court of law. *Keaton v. Jones*, 119 N. C., 43.

2. As a second ground why the action should not have been dismissed, this proceeding was properly begun before the justice of the peace. It is true a suit to surcharge and falsify an account was formerly called an equitable proceeding, but there is nothing in the Constitution of North Carolina which justifies the contention that a justice of the peace

has not equitable jurisdiction. There have been some few decisions to that effect, but an examination of the Constitution as it is written will show that such holding was but the survival of former ideas in regard to the distinction between law and equity, which was utterly abolished by the Constitution, which should be of more authority than any opinion which any judge may have inadvertently expressed. The language of the Constitution will speak for itself.

The Constitution of North Carolina, Art. IV. "Sec. 1. *Abolishes distinction between actions at law and suits in equity, and feigned issues.* The distinction between actions at law and suits in equity, and the forms of all such actions and suits shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated a civil action." It will appear from this that the distinction which formerly was deemed most essential between the actions at law and suits in equity and the forms of all such actions and suits were absolutely abolished in this State. There is nothing that indicates that that abolition applied only to the Superior Courts. The distinction was absolutely abolished, and could no longer have any existence in any court in this State by whatever name it might be called—whether it was a justice of the peace, a city court, a county court, a Superior Court, or the Supreme Court. Any decisions to the contrary are in contradiction of the very language of the Constitution, which could not be more explicitly or plainly expressed than it is written. Therefore, even if this could be termed an equitable proceeding to surcharge and falsify an account, still the object of the action by the town was to recover the sum of $42.75 taxes for the year 1916 due the plaintiff, which the taxpayer alleged he had paid to the tax collector, Cain, and which the latter asserted that he had paid over to the town, but which the evidence for the plaintiff showed was not embraced in any settlement, and was expressly excluded and omitted because the receipts were still in the collector's book, and he was given credit for them. The question was not to surcharge or change any settlement actually made, but whether the settlement as made embraced this sum, which was not a matter of equity but an issue of fact for the jury, which they should have settled.

But even if it were, as claimed, an action to surcharge the account, there is no authority in the Constitution which will justify holding that a justice of the peace would not have jurisdiction. Constitution, Art. IV, sec. 27, provides: *"Jurisdiction of justices of the peace.* The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract wherein the sum demanded shall not exceed $200, and wherein the title of real estate shall not be in controversy." This was a civil action founded on contract, and whether the question involved is one of equity or of law, as that distinction was formerly asserted, is immaterial, for that distinction was absolutely *abolished,* and therefore cannot exist in any court, and is not recognized in any line or word of the Constitution, nor in the provision which prescribes the jurisdiction of the justice of the peace or of any other court.

It is true that a justice of the peace cannot issue an injunction, nor can the Supreme Court (except a temporary one in a matter pending before it), nor can any other court except the Superior Court alone, but that is not because it is equitable, but because the statute does not confer the right to issue the ancillary remedies of injunction or mandamus on any other court. Just as the writ of prohibition can be issued only by the Supreme Court. These are not forms of action, but simply remedies, the right to exercise which is conferred on certain courts by legislation.

Besides what is already stated, this Court has recognized that the justice of the peace has jurisdiction of equitable matters. In *Levin v. Gladstein,* 142 N. C., 495, this Court held that the justice of the peace could take cognizance of an equitable defense, *Connor, J.,* saying: "It would be incompatible with our conception of remedial justice under the code system to require the defendant to submit to a judgment and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the Constitution and the adoption of our Code of Practice." If the justice has jurisdiction of an equitable defense, he must have jurisdiction of an equitable claim for the same reason.

3. There is a third reason why, being already in the Superior Court, this litigation over the sum of $42.75 should not have been taken from the jury and judge who were competent to decide it, and the town should not have been sent out of the Superior Court at heavy expense to begin exactly the same action upon the same subject in the very same Superior Court. The case had gotten into the Superior Court by appeal and even upon the contention of the defendant that court had jurisdiction of this subject-matter, and having jurisdiction, the plaintiff should not be sent out of court to come back again into the same court. There have been conflicting decisions of the Court on this question. These conflicting decisions are cited and arrayed in *Holmes v. Bullock,* 178 N. C., 379, 380, and need not be again repeated. The plaintiff who has appealed to the Superior Court admits thereby that that court is seized of jurisdiction. The defendant, who is seeking to evade the settlement of the issue by a plea that the justice did not have jurisdiction, is thereby affirming that the Superior Court has jurisdiction, and as, therefore, both parties admit jurisdiction there was no advantage to the administration of justice in the child's play of sending them out of the

court which both sides admit has jurisdiction to come back again into the same court upon the ground that the Superior Court has jurisdiction and inflicting the penalty of heavy costs in all three courts upon the plaintiff. In close analogy to this is the incident when Texas, then a new State, was a city of refuge for parties charged with crime. One of these citizens committed a homicide in Texas, and when advised by his friends to leave, exclaimed in dismay, "Where can I go? Am I not already in Texas?" Why dismiss the defendant from the Superior Court to come back into that court when he is already in the Superior Court.

To sum up:

1. The issue is simply payment or no payment, and even under the former technical system (happily and totally abolished now more than 50 years ago) it would have been an action at law begun before a justice of the peace to recover $42.75.

2. Even if an equitable proceeding to recover that sum, the justice had jurisdiction thereof under the Constitution, Art. IV, secs. 1 and 27.

3. Even if the justice of the peace did not have jurisdiction, the case having gotten into the Superior Court, that court should retain jurisdiction and determine the controversy. This principle has statutory recognition in C. S., 637, enacted to cure the decision to the contrary in *Brittain v. Mull,* 91 N. C., 498. See *Roseman v. Roseman,* 127 N. C., 497.

Under the old system in which technicality was more important than merits a plaintiff was dismissed if his lawyer guessed differently from the judge as to which of the many forms of action he should choose, or sued in equity when the judge thought it should have been at law or *vice versa.* If he sued in the wrong county, or if he had too many or too few parties, or pleaded more than the judge thought enough or too little, the case was dismissed. Now, the action is simply removed to the proper county and amendments are freely allowed as to pleadings and parties. These changes were all brought about by the demand that justice should be administered, and not injustice under the forms of law.

There is but one point in this case, and that is an issue of fact which can be settled only by a jury. It was before the jury, and they should have been allowed to settle it. The plaintiff was seeking to collect an item which it claimed that the tax collector had not paid in, and the defendant denied it. *The taxpayers of Morganton ought not to be required to pay the costs in three courts to get back before a jury in the same courthouse, upon the same evidence to decide the same question, which might and could have been settled in a few moments.*

SPROUT, WALDRON AND COMPANY v. J. L. WARD AND J. M. CANOY, TRADING AS WARD AND CANOY.

(Filed 11 May, 1921.)

1. **Contracts—Breach—Damages—Gains Prevented—Vendor and Purchaser.**

   The principle upon which a recovery of damages for gains prevented as well as loss sustained by the breach of a party to the contract applies to such damages as may fairly be supposed to have entered into the contemplation of the parties at the time the contract was made, and such as may naturally be expected to follow its violation, both certain in their nature and in regard to the cause from which they proceed.

2. **Same—Evidence—Appeal and Error—Reversible Error.**

   Where, in an action to recover the purchase price of a flour mill, the defendant sets up as a counterclaim in damages that the mill in question caused him a loss of patronage because it would not make good flour, whereby the plaintiff had breached his contract, the testimony of a witness in defendant's behalf, on the measure of damages, that he was not certain that he would otherwise have patronized the mill, but it was "likely" that he would have done so, is too uncertain for the jury to find an affirmative fact thereon, and its admission is prejudicial to the plaintiff and constitutes reversible error.

3. **Same—Warranty.**

   The measure of damages for the vendor's breach of contract in furnishing the purchaser with a flour mill that would not grind good flour is the difference between the value of the mill as the vendor contracted it would be, depending upon the nature of the contract of sale, or the warranty expressed or implied, and the value of the one delivered.

APPEAL by plaintiff from *Lane, J.*, at the July Term, 1920, of RANDOLPH.

Plaintiff contracted with defendants to sell them a roller mill outfit for $1,225, to be paid in certain specified installments. It shipped the mill to defendants, who alleged that it was so defective that it would not make good flour, and by reason thereof they failed to get patronage which otherwise they would have received, some of defendants' witnesses testifying that they would have had their wheat ground at defendants' mill "if they had made as good flour there as was made anywhere else," and one of their witnesses, Marcus Briles, was permitted to answer, over plaintiff's objection, the following question: "Q. State whether or not you would have patronized that mill if it had made good flour? A. I could not say for certain, it is likely that I would." One of the defendants was allowed to testify that they could have made a profit of $13 or $15 per day if the mill had been what it was represented to be. This estimate was not based on the existence of any contracts to grind at the mill, or on any trustworthy data, but evidently upon the opinion or conjecture of the witnesses as to what patronage the defendants would get, and upon the testimony of witnesses who stated they would have had their wheat and corn ground there if the grinding was done as well as at other mills.

The judge stated to the jury that there was no evidence as to what was the market price of the toll wheat or corn. The principal defect in the mill was in the shape of the reel, which should have been round. This was not rectified by plaintiff for some time after the mill was received by the defendants.

Issues were submitted to the jury, and a verdict of $500 returned by them for the defendants. Judgment rendered thereon, and plaintiff appealed.

H. M. Robins for plaintiff.
J. A. Spence for defendants.

WALKER, J., after stating the material facts: The judge erred, at least, in receiving the testimony of the witness, Marcus Briles, above set forth. Conceding for the sake of discussion that it was competent to show by witnesses that they would have had their flour and corn ground at defendants' mill if it had made good flour, the testimony of Briles should not have been admitted for that purpose, as he was not certain himself that he would have patronized the mill under the circumstances stated in the question, and it was not more than "likely" that he would. If he was not certain, how could we expect the jury to be certain about it and to consider his answer in determining the amount of damages. And they may have considered it, and most probably did, for the court admitted it as some proof of the profits that would have been realized.

We held in *Machine Co. v. Tobacco Co.*, 141 N. C., 284 (affirmed in *Hardware Co. v. Buggy Co.*, 167 N. C., 423):

"1. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

"2. The law seeks to give full compensation in damages for breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient or reasonable certainty.

"3. In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, or otherwise, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation."

In the first case the plaintiff had contracted for the exhibition of certain cigarette machines, manufactured by himself, at the St. Louis Exposition, and defendant broke his contract by failing to exhibit the machines sent to him for the purpose, and plaintiff claimed as damages the loss of profits he might have made if the contract had been complied with by defendant, there being no sufficient data afforded by the contract itself or by evidence relevant thereto by which profits could be ascertained, and for this reason the recovery of profits was disallowed. With respect to somewhat similar facts, the Court (by *Justice Connor*) said, in *Coles v. Lumber Co.*, 150 N. C., 183: "The suggestion that if the yard had been relieved of the lumber which plaintiff was to take, the defendant could or would have sawed other lumber, piled it on the yard, and sold it at a profit is too speculative and remote. Too many contingencies are involved to make it a safe measure or element of damage. If one is under contract obligation to remove lumber from a yard at a given time and fails to do so, in the absence of any special circumstances entering into the contract when made, he is liable for the use and occupation; that is, a fair rental value of the yard. In ascertaining its rental value, evidence of the manner in which it was used or capable of being used would be competent." It was likewise said in *Jones v. Call*, 96 N. C., at pp. 344 and 345: "There are many contingencies attendant upon all business—the possible loss by fire, the breaking of machinery, death, sickness, and other causes, may interrupt or suspend its prosecution. These cannot be estimated in advance, and profits must be largely dependent upon them. It is for this reason that the actual, not conjectural, loss constitutes the plaintiff's claim to compensation."

There are other cases decided by this Court much to the same effect, or bearing more or less upon this question. *Willis v. Branch*, 94 N. C., 149; *Johnson v. R. R.*, 140 N. C., 580; *Walser v. Tel. Co.*, 114 N. C., 440; *Tompkins v. Cotton Mills*, 130 N. C., 350; *Sharpe v. R. R.*, *ibid.*, 613; *Foard v. R. R.*, 53 N. C., 235; *Reiger v. Worth*, 127 N. C., 230. It is not that the party suffering a loss from another's breach of contract should not be compensated for the same, but it is the difficulty of ascertaining the measure of compensation by reason of the uncertain and speculative nature of the damages when profits that would have been realized but for its breach are claimed as an element of damages. If allowed where they are uncertain, the jury have no standard by which to gauge the damages, but are left to pure conjecture, and perhaps a mere guess. This would be a grave injustice to the party who has to pay them, and may far exceed the proper and just compensation of the other party. We said in *Machine Co. v. Tobacco Co., supra,* at pp. 289 and 290: "Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. *Ashe v. DeRosset,* 50 N. C., 299; *Griffin v. Colver,* 16 N. Y., 489. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in any estimate of damages. They may be necessary to completely indemnify the injured party, and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty, which is required, does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that whenever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages."

The court erred in admitting the testimony of the witness, Marcus Briles. The other objections need not be considered, as evidence may be presented at the next trial of a more certain and definite character. The error above indicated is sufficient to entitle the plaintiff to another trial, and in the exercise of our discretion we extend it to all of the issues, as the questions are so correlated that the case can be better tried in that way.

Defendants may recover as their damages, if satisfied therewith, the difference between the value of the mill as plaintiffs contracted it should be and the value as it was when delivered. *March v. McPherson,* 105 U. S., 709; *Parker v. Fenwick,* 138 N. C., 209; *Mfg. Co. v. Oil Co.,* 150 N. C., 150; *Guano Co. v. Livestock Co.,* 168 N. C., 442. The measure of damages in such a case would depend, of course, upon the nature of the contract of sale, or the warranty express or implied.

New trial.

J. R. BURRIS v. JAY LITAKER AND W. C. LITAKER.

(Filed 11 May, 1921.)

1. Negligence—Principal and Agent—Parent and Child—Automobiles.

A parent is liable for damages caused by the negligent driving of his automobile by his minor son, when the automobile is maintained for the pleasure and convenience of his family, and at the time in question the son was using it for that purpose, under his express or implied authority.

2. Appeal and Error—Harmless Error—Negligence—Verdict—Principal and Agent—Parent and Child.

Where there is evidence sufficient to hold the father answerable in damages caused by the negligence of his minor son in driving his automobile, in an action against them both, the error of the court in sustaining a motion of nonsuit as to the father will not be held for reversible error when the jury has answered the issue of the negligence of the son adversely to the plaintiff.

3. Appeal and Error—Objections and Exceptions—Instructions.

In order to have the Supreme Court consider an exception based upon the failure of the trial judge to direct a verdict upon an issue should they believe the evidence, it is necessary that a prayer for instruction to that effect had been aptly tendered and refused.

APPEAL by plaintiff from *Lane, J.*, at the November Term, 1920, of CABARRUS.

The action is to recover damages done to plaintiff's automobile in a collision on the public road leading from Concord to Kannapolis by the alleged negligence of Jay Litaker, a minor son, 17 or 18 years of age, who was driving his father's car, and who was endeavoring to pass another automobile in front of him. In making this effort he ran into plaintiff's car, which was on the road coming from the opposite direction. W. C. Litaker, his father and owner of the car, but who was not present at this time, was made party defendant. There was also a demand in the complaint against Jay Litaker for $250, cost of repair of plaintiff's machine necessitated by the injury, and for loss of time, etc., incident to the wrong and which said Jay Litaker had agreed to pay plaintiff. There was denial of liability by plaintiff. At the close of plaintiff's evidence, on motion, the court entered judgment of nonsuit as to W. C. Litaker, the father, and plaintiff excepted. On issues submitted the jury rendered the following verdict:

"1. Was the plaintiff's automobile injured by the negligence of the defendant Jay Litaker, as alleged in the complaint? Answer: 'No.'

"2. What damages, if any, is the plaintiff entitled to recover by reason of the negligence of the defendant Jay Litaker, as alleged? Answer: .. ..

"3. Did the defendant J. Litaker agree with the plaintiff that if he would have the car repaired that he, the defendant J. Litaker, would pay the repair bill? Answer: 'Yes.'

"4. If so, what was the amount of the repair bill? Answer: '$153.80.'"

Judgment on the verdict against Jay Litaker for the $153.80, and the plaintiff excepted and appealed, assigning errors.

H. S. Williams for plaintiff.
Maness & Armfield for defendant.

HOKE, J. In *Tyree v. Tudor, ante,* 214, a case at the present term wherein the question was directly and fully considered, the Court held that "Where a parent maintains an automobile for the comfort and pleasure of himself and family, he may be held liable for injuries caused by the negligent operation of said car by a member of his family who is using it at the time for the purpose stated and under his express or implied authority." In the present case there are facts in evidence permitting the inference that Jay Litaker at the time of the occurrence, a minor, 17 or 18 years of age, was a member of the father's family and was operating his car under his express or implied authority, and it would seem that the motion for nonsuit as to the father and owner of the automobile should not have been allowed. In our opinion, however, this action of the court should not be held for reversible error for the reason that the jury have found that there was no negligence on the part of the son. If the father is liable at all in the case, it is only on the principle that the son acting as his agent was guilty of negligence, the proximate cause of defendant's injuries, and this fact having been established against the plaintiff, the result of the trial should not be disturbed by reason of the exception.

In *Cherry v. Canal Co.,* 140 N. C., 422-426, the Court quotes with approval from 2 A. & E., Pl. and Pr., p. 500, to the effect that "This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections which the record shows could not have prejudiced the appellant's rights." On plaintiff's second objection to the validity of the trial that the court failed to charge the jury "if they believed the evidence they should answer the first issue 'Yes,' that as to defendant's negligence our decisions hold that where the case is not proper for the consideration of the jury, an exception of this kind will not be sustained, unless there has been a prayer for instructions to that effect preferred in apt time." *Wiggins v. Guthrie,* 101 N. C., 661-678.

On consideration of the case presented, we find no reversible error in the record, and the judgment on the verdict is approved.

No error.

GEORGE F. BLACKWELL v. THE CITY OF GASTONIA.

(Filed 11 May, 1921.)

1. Taxation—Licenses—Automobiles—Cities and Towns—Municipal Corporations—Action to Recover—Statutes.

To recover of a municipality the amount collected in excess of that allowed by law for an automobile tax, it is necessary to comply with an existing statute requiring that demand for a return thereof should have been made within a period therein prescribed.

2. Same—Protest—Common Law.

In order to recover money paid a municipality as a license tax in excess of the amount the town was lawfully authorized to collect, and in the absence of statutory regulations, or under the common law, it is necessary that the one so paying should have done so under protest at the time or under circumstances of duress or such as would endanger his person or property; and where the payment has been voluntarily made, the action may not be successfully maintained.

APPEAL by plaintiff from *Bryson, J.,* at the December Term, 1920, of GASTON.

This is an action instituted in the justice's court on 16 August, 1920, to recover the sum of $24 paid by him to the city of Gastonia as a license tax imposed by said city for the business of operating one automobile for hire in said city, for the fiscal year beginning 1 June, 1919, to 1 June, 1920.

The amount of tax collected was $25, of which the plaintiff now seeks to recover $24, claiming that said city had no authority to impose a tax of more than $1.

It is admitted that the city of Gastonia is a municipal corporation, the same being chartered under chapter 199, Private Laws 1913, sec. 22 of which provides as follows: "The board of aldermen of the city of Gastonia, in addition to the powers of taxation heretofore granted, shall be and they are hereby empowered to levy and collect an annual privilege or license tax on all trades, professions, agencies, business operations, exhibitions, and manufactories in the said city," etc.

Also Public Laws 1917, ch. 136, subch. V and sec. 1, subsec. (j) provides that all cities and towns are authorized "To license and regulate all vehicles operated for hire in the city." In pursuance of this authority the said city of Gastonia passed and adopted the revenue ordinance, and collected the said tax of $25 from the plaintiff Blackwell on 10 June, 1919, and issued to him the license which is set forth in full in the record, and dated 10 June, 1919.

Blackwell applied for said license and made no protest, and no threats were made to force him to pay the same. The plaintiff Blackwell made no demand upon the defendant for the return of said tax until 1 June, 1920, almost a year after payment of the same.

His Honor held the plaintiff was not entitled to recover, and entered judgment of nonsuit, and plaintiff excepted and appealed.

George W. Wilson for plaintiff.
P. W. Garland for defendant.

ALLEN, J. This action had been brought because of the decision in *S. v. Fink,* 179 N. C., 712, in which it was held that municipal corporations did not have authority, under the statute then in force, to charge a license tax on motor vehicles greater than $1, and under that decision the tax of $25 paid by the plaintiff was illegal, but it does not follow necessarily that the plaintiff can maintain this action to recover the tax so paid. Taxation being essential to the maintenance and administration of government, the courts are slow to admit claims which hinder the collection of taxes or deprive the government of the benefit of them, and usually the legislative branch regulates when and how actions may be brought relating to controversies in regard to taxes.

Pursuant to this policy the General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in *R. R. v. Reidsville,* 109 N. C., 497, and *Wallace v. Teeter,* 138 N. C., 264, that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax.

The present statute is not in the same language used in 1887, but the same purpose prevails, the same relief is afforded the taxpayers, and it would seem to be broad and comprehensive enough to cover all taxes, and if so the plaintiff cannot recover because he did not demand the return of the tax within thirty days after payment.

But if the tax which the plaintiff paid is not within the statute, he is in no better condition, because he did not pay under protest, and independent of statute, as said in *Teeter v. Wallace, supra,* "the remedy at common law was to pay under protest and recover back the money so paid in an action for money had and received," and this seems to be the rule which generally prevails.

The author says in 26 R. C. L., 455: "A person who voluntarily pays an illegal tax, even though he pays it under considerable actual pressure, cannot maintain an action to recover it back. . . . But the person assessed is not required to wait until his property is seized and sold, but whenever a party not liable to taxation is called upon peremptorily to pay upon a warrant under which the collector may without any judicial proceeding arrest his person or seize his property and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and, by showing that he is not liable, recover it back as money had and received." And in 37 Cyc., 1178: "Whatever may be the ground upon which objection to a tax or to the assessment of it may be made, it is a well settled general rule that if the tax is paid by the person assessed voluntarily and without compulsion it cannot be recovered back in an action at law. . . . A payment is voluntary, in the sense that no action lies to recover back the amount, not only where it is made willingly and without objection, but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or the grasp of legal process."

Many authorities go further than this and hold that in the absence of a seizure of the person or property or a threat to do so, taxes paid cannot be recovered although there is a formal protest.

In *Managhan v. Lewis,* 10 Anno. Cases, 1050 (Del.), the Court denied a recovery, and said: "It appears from the case stated that the plaintiff, at the time of his payment of said taxes, made verbal objections to the payment of the same, and that the defendant, at that time, indorsed on the bill for said taxes and signed the following memorandum:

" 'The amount paid in settlement of this bill of taxes was paid to me by said taxable under protest as being illegally exacted and with the avowed intention of suing for its recovery.'

"It does not, however, appear that the plaintiff was sued, or that his property was distrained for said taxes, or that such suit or distraint was threatened, or that compulsion of any kind was used or threatened to enforce such payment.

" 'The coercion or duress which will render a payment of taxes involuntary must, in general, consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief except by making payment.' 2 Dillon Munic. Corp., par. 943.

" 'The payment by the plaintiff must have been made upon compulsion, as for example, to prevent the immediate seizure of his goods, or the arrest of the person, and not voluntarily. Unless these conditions concur, paying under protest will not, without statutory aid, give a right of recovery.' 2 Dillon Munic. Corp., par. 940.

"In *Wilmington v. Wicks,* 2 Marv. (Del.), 297; 43 Atl. Rep., 173, it was held that money paid under protest for a city license under an ordinance subsequently declared invalid was a voluntary payment, and could not be recovered back."

It appears from the note to the last case, and one to *Phoebus v. Manhattan Social Club,* 8 Anno. Cases, 667, that twenty-two states follow this doctrine.

The judgment must therefore be

Affirmed.

CHARLES A. BROWN AND BROTHER v. JOHN BARTON PAYNE, DIRECTOR GENERAL, SOUTHERN RAILWAY COMPANY, ET AL.

(Filed 18 May, 1921.)

1. Carriers of Freight—Acceptance—Damages.

No liability attaches to the common carrier for damages to or loss or destruction of goods until its acceptance thereof is legally established. The distinction is observed when a penalty is sought for failure to make shipment.

2. Same—Evidence—Instructions—Verdict Directing—Custom.

Where the custom at the carrier's station is relied on to prove its acceptance of a carload of lumber placed on its right of way for shipment, testimony of the plaintiff's agent that in accordance therewith the local agent of the carrier told him he would get a car for it as soon as he could, and the lumber was placed where the carrier's agent told him, who then accepted it, saying he would get at it as soon as he could, and this was before the occurrence of a fire destroying the property, causing the damages in suit: *Held,* the acceptance of the order for a car and the acceptance of the goods are two different things, and an instruction to the jury if they believed the evidence to answer the issue in the affirmative is reversible error, the determination thereof being for the jury, under a proper instruction.

APPEAL by defendant from *Lane, J.,* at September Term, 1920, of ROWAN.

Civil action to recover of defendant, as a common carrier, (1) damages for the loss of a carload of lumber belonging to plaintiffs; and (2) for an alleged negligent burning of same.

Plaintiffs, who are lumber dealers, undertook to ship some lumber from Elmwood, N. C., to the Danville Lumber Company, Danville, Va., in the summer of 1918, over the defendant's railroad. The particular property in controversy, which was destroyed by fire, was placed and stacked on the defendant's right of way, where it remained for a month or longer, awaiting the arrival of a car, and was destroyed by fire while thus stacked on the right of way of the Southern Railway Company at Elmwood station.

The evidence was conflicting as to whether there had been a delivery to and acceptance by the common carrier of the goods for shipment under the established manner of dealing between the parties. Touching this question, C. A. Brown, one of the plaintiffs, testified: "When I got an order for lumber I would have it hauled to the siding and order a car, and the next thing would be to load it. Then I would go to the agent and get a bill of lading. There was nothing to hinder me from moving the lumber away from the siding. If I had had a customer I could have sold the lumber, and he would have had a right to move it away at the time. It was my lumber as long as it was lying there at the siding. It is the custom when a shipment is made to place the goods in the car and then go to the agent and turn it over to him. This lumber was worth $500."

C. D. Crouch, witness for plaintiffs, testified: "I ordered the car from Mr. Shell, defendant's agent, three or four days after 30 July. Shell told me that he would get a car as soon as he could. He showed me where to place the lumber and I placed it where he told me. I told him it was a carload of lumber. The agent was present when I was delivering it, and he accepted the order for the car, and said that he would get it as soon as he could. This was some time before the fire. I continued to haul other lumber there."

The court charged the jury if they believed the evidence, as testified to by the witnesses, to answer the first issue "Yes," the second issue "No," and the third issue "$500."

Under this instruction the jury returned the following verdict:

"1. Is defendant, John Barton Payne, Director General, as agent Southern Railway Company, liable as common carrier to plaintiff for the loss of the lumber alleged in the complaint? Answer: 'Yes.'

"2. Was plaintiff's lumber burned and damaged by the negligence of the defendant John Barton Payne, Director General, as agent of the Southern Railway Company, as alleged in the complaint? Answer: 'No.'

"3. What damage, if any, is plaintiff entitled to recover? Answer: '$500, and interest from 9 September, 1918.'"

From a judgment in favor of the plaintiffs, defendant appealed.

B. B. Miller and Clement & Clement for plaintiffs.
Linn & Linn for defendant.

STACY, J. Upon the record, we think the first issue should have been submitted to the jury under a different instruction. The liability of a common carrier of goods, as carrier, attaches only after acceptance and receipt of freight by it for shipment. *Basnight v. R. R.,* 111 N. C., 592; *Wells v. R. R.,* 51 N. C., 47; 10 C. J., 231.

The case of *Bell v. R. R.,* 163 N. C., 180, chiefly relied on by plaintiffs, was an action against the railroad for failure to furnish cars within a reasonable time as required by the statute. But the suit at bar is not to recover the statutory penalty for failure to make shipment, but for the value of the lumber destroyed.

There was evidence on behalf of plaintiffs tending to show the manner and custom of shipping lumber from Elmwood station as follows: "It is the custom when a shipment is made to place the goods in the car and then go to the agent and turn it over to him." And again the witness Crouch testified: "The defendant's agent was present when I was delivering the lumber, and he accepted the order for the car and said that he would get it as soon as he could."

It will be observed that accepting an order for a car and accepting lumber for shipment are two different things. The one does not establish the relation of carrier and shipper, while the other ordinarily does. Furthermore, there was evidence tending to show that the shipment had not been turned over to defendant's agent at the time of the fire. Hence, in the present state of the record, we think the case must be retried and the issues submitted to another jury.

New trial.

JAMES MACK v. CHARLOTTE CITY WATER-WORKS, CHARLOTTE BOARD OF WATER COMMISSIONERS, AND CITY OF CHARLOTTE.

(Filed 18 May, 1921.)

1. Municipal Corporations—Cities and Towns—Managing Boards—Water-works—Principal and Agent.

Where a city owns and controls its water-works system under the special management of a board of water commissioners, this last is an official departmental board, created as a part of the city government for the more convenient and efficient ordering of the water-works and supply, and their action on matters in the line of their official duties and within the scope of their powers is the action of the city, and suits and demands on the part of individuals growing out of their management as a board are to be regarded and dealt with as suits against the city.

2. Same—Actions—Governmental Functions.

A municipality may not be held liable at the suit of individuals for injuries caused by its officials when in the exercise of governmental functions and matters affecting only the public interests, unless such liability is expressly recognized and provided for by statute.

3. Same—Fires.

A municipality, under the common law, is only to be regarded as exercising governmental powers in providing a water supply for the purpose of fire protection, and may not be held liable in damages to its citizen for failure to have supplied an adequacy of water to extinguish the flames on his burning house, though it supplies water for the individual use of its citizens for pay. *Munick v. Durham*, *ante*, 188, cited and distinguished.

4. Same—Statutes—Constitutional Law.

The common-law principle upon which a city may not be held liable for its failure to supply sufficient water for extinguishing fires is now set at rest by our valid statute. C. S., 2807.

APPEAL by defendant from *Bryson, J.,* at the September Term, 1920, of MECKLENBURG.

The action is to recover damages for destruction of a building of plaintiff, situated within the limits of the city of Charlotte, and caused by the alleged negligence of defendants in failing to furnish a timely and adequate water supply to enable the fire department to extinguish the fire and save plaintiff's building. There was judgment overruling the demurrer and defendants excepted and appealed.

T. L. Kirkpatrick and H. L. Taylor for plaintiff.
Pharr, Bell & Sparrow for defendants.

HOKE, J. The city of Charlotte is now under a commission form of government, and at and before the time of this occurrence it owned and controlled its water-works and supply, this same being under the special management of the board of water commissioners of the city of Charlotte. Both under the present and preceding forms of government, this last was an official departmental board, created as a part of the city government for the more convenient and efficient ordering of the water-works and supply. And their action on matters in the line of their official duties and within the scope of their powers is the action of the city, and suits and demands on the part of individuals growing out of their management as a board are in fact and truth suits against the city, and must be so considered and dealt with in determining the rights of parties involved in such a controversy. Consolidated Statutes, ch. 56, secs. 2807-8-9, 2833 *et seq.*, 2878, etc.; Private Laws 1907, ch. 342, sec. 174, etc.

This being true, our decisions hold, and the present statute is in full affirmance of the principle (C. S., 2807), that a municipality may not be held liable at the suit of individuals for injuries caused by its officials when in the exercise of governmental functions and matters affecting only the public interests, unless such liability is expressly recognized and provided for by statute.

In a recent case on this subject this limitation on the right to suit for such an injury is stated as follows: "The principle upon which a municipality engaged in supplying water to the individual citizen, under contract for profit or pay, must be considered and dealt with as a private owner, applies to the ordinary burdens and liabilities incident to their private business relations, and not to its work for the public generally, such as procuring its water supply and extending it, providing for fire protection and sanitation purposes, and the like, for therein the municipality is to be regarded as a governmental agency and, as such, possessing and capable of exercising the powers and privileges conferred upon it by law." *Felmet v. Canton,* 177 N. C., 52.

The question was directly presented and same ruling made in *Howland v. Asheville,* 174 N. C., 749; *Harrington v. Greenville,* 159 N. C., 632; *McIlhenney v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237, are in recognition of the same general principle.

And if there should be any doubt that this is now the approved position with us the matter would seem to be put at rest by C. S., 2807, which provides in part as follows: "The city may maintain its own light and water-works system to furnish water, for fire and other purposes, and light to the city and its citizens, but shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light," etc.

Such a statute has been held to be well within the legislative powers to the extent that it applies to "official acts, governmental in character, or for the benefit of the public generally." 19 R. C. L., p. 1111, Title, Municipal Corporations, sec. 392, citing *Schigley v. Waseka,* 106 Minn., 94, and other cases, and is undoubtedly controlling on the facts of this record.

In *Munick v. Durham, ante,* 188, opinion by the *Chief Justice,* a recovery against the city was sustained, but that was a suit growing out of the settlement of claimant's water bill, and involving only the business relations between the individual and the city as vendor of water for profit, and not as here in a matter concerning the water supply for general fire protection. The two cases serve very well to illustrate the two classes of actions, and mark the distinction between them.

There was error in overruling the demurrer, and on the facts presented judgment should be entered for defendant.

Reversed.

BRUNSWICK-BALKE-COLLENDER COMPANY v. MECKLENBURG COUNTY.

(Filed 18 May, 1921.)

1. **Taxation—Licenses—Payment Under Protest—Actions—Procedure—Statutes.**

   In order to recover a license tax alleged to have been unlawfully demanded by a county, the taxpayer is required to pay the tax under a written protest, and make written demand upon the county treasurer within thirty days, and upon his failure to refund within 90 days the person so paying the tax may maintain his action against the county, including in his demand both the State and county taxes. C. S., 7919.

2. **Taxation—Licenses—Mortgages—Liens—Priority.**

   The lien of a license tax on a business is superior to that of a chattel mortgage on the property therein used, and the amount thereof is not abated by reason of an unexpired year. C. S., 7776-7786.

3. **Constitutional Law—Statutes—Taxation—Statutes Valid in Part.**

   A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other.

4. **Constitutional Law—Taxation—Licenses—Police Powers—Discrimination—Counties—Discretion.**

   Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at February Term, 1921, of MECKLENBURG.

The action is instituted by plaintiff against Mecklenburg County to recover the sum of $1,010.60 paid by the plaintiff to the sheriff under protest to prevent a sale of certain personal property upon which plaintiff held a chattel mortgage, the said sum being a license tax alleged to have been due to State and county by the Mecklenburg Amusement Company for the year commencing 1 June, 1918, and expiring 31 May,

1919. The facts in evidence tended to show that plaintiff, on 10 October, 1917, sold to one Robert Welch twenty pool tables, etc., taking a mortgage, or contract for conditional sale, duly registered, to secure purchase price. That some time thereafter said Welch sold his interest in said property to the Mecklenburg Amusement Company, and this company operated said pool tables at Liberty Park, outside the corporate limits of the city of Charlotte, from some time the latter part of 1917 until about the first of February, 1919. That the sheriff collected the license tax from the company for the year ending 31 May, 1918, though the company operated said tables, etc., to last of January or first of February, 1919, as stated, without having paid the tax or obtained license or applied for same to the county commissioners or otherwise. That the levy by the sheriff was for the unpaid tax and the plaintiff holding the mortgage or lien to secure the debt paid same under protest, having made proper demand upon treasurer of the county and the State Treasurer, as the statute requires, instituted this action to recover the amount. It further appeared that on obtaining possession of the property plaintiff caused it to be sold at public auction under the terms of the mortgage or lien, and bought the same in at $2,200, and plaintiff's indebtedness at the time of sale, and secured by the instrument, was $2,726.96. Plaintiff admitted that the property was worth at least the $2,200, and on an issue submitted the jury fixed the market value of same at $3,750.

On these, the facts pertinent, the court entered judgment that the defendant go without day, and plaintiff excepted and appealed.

J. Laurence Jones and A. B. Justice for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

HOKE, J. Plaintiff has taken the proper course to test his right to relief. The law on the subject, C. S., 7979, making provision that where "a person claims that a tax or assessment charged against him is invalid he shall pay under written protest and on written demand upon the treasurer of the county or the State within 30 days, and upon a failure to refund within 90 days he may maintain his action against the county, including in his demand both the State and county tax," and in pursuing this course it is not contended that the tax, if valid, should not prevail over plaintiff's lien, or that there should be any abatement by reason of the portion of the year unexpired at the time the pool tables were closed down. Here, also, the statute is expressly to the contrary, C. S., 7776-7786. Plaintiff, however, bases his right to recover on the ground that the statute imposing the tax is unconstitutional and void, and this for the reason chiefly that it confers on the county commissioners the arbitrary power to grant or withhold the license required to operate these tables in the manner designated. The statute in question, 2 C. S., ch. 131, Art. 3, title Taxation, imposes an annual tax of $25 on all billiard and pool tables, bowling alleys, and all alleys of that kind kept for public use, requires a license for that purpose to be issued by the sheriff, makes it a misdemeanor to operate without a license, and in sec. 7827 contains, among others, the proviso that the sheriff shall not issue a license to any person or corporation to maintain such billiard or pool table or bowling alley for public use outside of any incorporated city or town except with the approval of the county commissioners, "and all applications for such license are hereby required to be filed with the county commissioners at least ten days before being acted upon, and notice thereof published in some newspaper published in the county once a week for two weeks, or posted at three conspicuous places in the community where the license is to be exercised for two weeks prior to the action of the county commissioners thereon." If it be conceded that this proviso, on which plaintiff bases his principle objection to the statute is void because conferring arbitrary power, it is only a police regulation in reference to a license to operate, and both that and the criminal feature of the law are in aid of collection of the tax, which is levied generally on "each billiard and pool table or tract for a bowling alley, etc., operated for public use." If we were to strike out the proviso, this tax so imposed would remain, these different portions of the law not being so interdependent that one must fall with the other. *Comrs. v. Boring,* 175 N. C., 105; *Lowery v. School Trustees,* 140 N. C., 33; *Cotton Mills v. Waxhaw,* 130 N. C., 293; *Berry v. Haines,* 4 N. C., 311, and being a valid debt collection would be enforcible either by other methods and means provided by the statute or by action. *State and Guilford County v. Georgia Company,* 112 N. C., 34.

But the proviso in our opinion is not invalid. It is fully recognized that these billiard and pool tables, when kept open for indiscriminate use by the public, may, and not infrequently do, become the source of disorder and demoralization, and that it is absolutely essential that power should be lodged in some governmental board to withhold or revoke the license in such cases, and the proviso in the statute is very far from conferring arbitrary powers on the commissioners, but they are to give these applications for license a public hearing after full notice and decide the question according to their sound discretion, and their action may be reviewed when it shows that it has been palpably arbitrary and unjust. *Rosenthal v. Goldsboro,* 149 N. C., 128, and cases cited. In *S. v. Tenant,* 110 N. C., 609, the case in this State chiefly relied upon by appellant, involved the validity of an ordinance of the city of Asheville, which prohibited any and all owners of property within the city from building or erecting anywhere in the city limits any house or building of any kind or character or adding to or altering any house or building already constructed without first obtaining permission from the board of aldermen. The court held the ordinance void, as an unwarranted interference with the ordinary incidents of ownership, at the arbitrary will of the board of aldermen without valid reason had or assigned for their action, and as having no reasonable relation to the exercise of the police powers vested in the board for the well ordering of the town. And so in the case of *Yick Wo v. Hopkins, Sheriff,* 118 U. S., 356, a municipal ordinance of the city and county of San Francisco attempting to regulate laundries was held void as conferring arbitrary powers on the board of supervisors of the county, and for the further reason that the same was being administered with an "evil eye and an unequal hand," and with a view of suppressing or making burdensome discriminations against the Chinese engaged in that occupation. But those cases are not in support of plaintiff's position on the facts of this record where the county commissioners are given the power to pass on the issuing of the license for operating billiard and pool tables for public use as a reasonable exercise of the usual and ordinary police powers prevailing in such cases, to be issued only after notice and hearing had in the sound discretion of the board, a distinction fully and expressly recognized in the *Yick Wo. v. Hopkins* and other cases relied on by the appellant. The further objection that the statute makes unreasonable discrimination as to the licensing of these tables between town and country is without merit. It is fully established that the right of classification "is referred very largely to the legislative discretion and its exercise is not to be disturbed unless same is clearly arbitrary." *S. v. Stokes,* at present term, citing *S. v. Burnett,* 179 N. C., 735; *Smith v. Wilkins,* 164 N. C., 136; *Efland v. R. R.,* 146 N. C., 135; *Ins. Co. v. Daggs,* 172 U. S., 557; *Tullis v. R. R.,* 175 U. S., 348-353. The fact that in the country the operation of these tables is as a rule without the instant police supervision that usually prevails in the cities is a good reason for the distinction, and of itself affords sufficient basis for the classification objected to.

The statute imposing the tax in our opinion being a valid law, the obligation to pay is absolute, and the same is collectible whether the owner has operated under or in defiance of the public regulations as to license. The authorities so hold, and we do not understand that appellant desires to question this position. *Foster v. Speed* (Tenn.), 111 S. W., 925, citing *State v. Tucker,* 45 Ark., 55; *State v. Funk,* 27 Minn., 318, and other cases.

We find no error in the record, and the judgment of the Superior Court is

Affirmed.

JOHN JUSTICE v. THE BOONE FORK LUMBER COMPANY.

(Filed 18 May, 1921.)

1. **Appeal and Error—Service of Case—Affidavit—Counter Affidavit—Certiorari.**

An affidavit of counsel that time had been agreed upon for preparing and serving his case on appeal will be considered in the Supreme Court on appellee's motion to dismiss, where uncontradicted by counter affidavit, and the motion will be disallowed, and a *certiorari* will issue, where appellant shows merits.

2. **Same—Settlement of Case.**

Where the trial judge has not sufficiently passed upon the appellant's exceptions to the report of a referee and has unsuccessfully endeavored to draw a judgment satisfactory to the parties, which was to be first submitted to them before filing, and has inadvertently failed to notify the appellant of its filing, who was not satisfied therewith and desired to appeal, his exceptions presenting serious legal questions for final adjudication, the Court will remand the case to afford the appellant opportunity to be heard upon his exceptions by the trial judge, and to have him settle the case on appeal, in the course and practice of the court, upon the refusal in the Supreme Court of the appellee's motion to dismiss.

3. **Appeal and Error—Reference—Superior Court—Affirmance of Report—Evidence.**

The Supreme Court will not, on appeal, pass upon the affirmance by the trial judge of facts found by the referee, upon supporting evidence.

4. **Appeal and Error—Docketing of Case—Superior Courts—Order Extending Time for Docketing.**

While the trial judge may not extend the time of appellant to file his case on appeal, except by consent, this consent is presumed when the order for an extension is filed, or is of record.

APPEAL by defendant from *Harding, J.*, at the October Term, 1920, of AVERY.

This action was brought to recover a balance due on a logging contract. It was referred to a referee, by consent, to take and state the account between the parties. He filed his report, and defendant excepted thereto. The court considered the exceptions and sent the case again to the referee with the exceptions, and directed him to reconsider it, and this was repeated a third time, the referee refusing to change his report. The case came on for hearing before the judge, and he agreed with counsel for defendant to prepare and submit to them a judgment which should be only tentative, and not bind them, unless they agreed to it, and if they did not, he would notify the parties and have the case argued before him. Defendants were to be notified of the judgment when filed. This, through inadvertence, was not done. Defendants appealed and were granted 60 days from 1 August, 1920, to file their case on appeal, and plaintiff a like number of days to file a countercase or exceptions. Defendant did not file their case within the 60 days allowed to it, but filed it on 16 October, 1920, the time originally allowed to it having expired on 12 October, 1920. Plaintiff moved in this Court to dismiss the appeal for this reason. The defendant replied to the motion by the affidavit of the attorney, who represented it, that the reason its case on appeal was not filed within the 60 days, originally granted to it, was that one of the attorneys for the plaintiff had agreed with its attorney that defendant might have an extension of time to file its case, which should not exceed four more days, and the appellant's case was filed within the time of the extension, and it so appears in the record to have been filed. Plaintiff did not reply by affidavit to the affidavit of defendant's attorney, who acted for it in the matter, but relied simply upon the written motion to dismiss, stating the grounds upon which he relied for dismissing the appeal, but not verified by his oath.

Harrison Baird, F. A. Linney, and Charles Hughes for plaintiff.
W. R. Lovill and W. C. Newland for defendant.

WALKER, J., after stating the material facts of the case: First. As to the motion to dismiss the appeal. We have decided in several cases, and very recently in *Brown v. Taylor,* 173 N. C., 700 (citing *Sondley v. Asheville,* 112 N. C., 694), that we will not hear counsel, on matters of controversy between them, as to an extension of time for preparing and serving a case on appeal, but this rule does not apply, where the appellant alleges in an affidavit, or duly verified statement, that there was an agreement for an extension of the time, and this affidavit is not disputed by the oath of the appellee, who, therefore, has waived any irregularity or defect in the order for an extension made by the judge, if there be such, by agreeing to further extension to 16 October. This case cannot be distinguished from *Brown v. Taylor, supra,* which will appear by the following short recital of its facts and the decision of the Court therein: "The plaintiff moved in this Court to strike out from the record the case on appeal on the ground that it was not served in time, and to affirm the judgment. The defendant moves for a *certiorari* in order that the case on appeal may be settled, and filed affidavits showing an agreement of one of the counsel for the plaintiff extending the time for service of case on appeal. No affidavit of counsel with whom the agreement is alleged to have been made has been filed. The motion of the plaintiff is denied, and the motion for a *certiorari* is allowed, because while we will not pass on affidavits and determine whether an oral agreement which is denied has been made, we do consider affidavits showing an agreement, which are uncontradicted." This motion is therefore denied.

Second. As to the other question. It appears that there was much irregularity in the proceedings of the Superior Court, and we may do injustice to one or the other of the parties and may not reach the merits of this case unless we disregard what has been done since the judge considered and passed upon the exceptions to the referee's report and filed the tentative judgment. There surely has been a misunderstanding between the court and the defendant, as far as appears, and it would not be just to hold the judgment conclusive under the circumstances. The appellant may well have been misled, and says he was, by the failure to give him the promised notice. The learned judge endeavored to rectify the mistake which resulted from his inadvertence, and the appellant should not be made to suffer on account of it, as the exceptions present questions worthy of serious consideration. If the allegations are true, there has been no fair opportunity to be heard fully on the exceptions to the report, which is appellant's right. Besides, the judge's affirmance of the report, as to the facts found by the referee, will not be reviewed here, as we have so often held, and this would prejudice the appellant, if it is to stand, and he cannot be heard fully upon such findings.

It is true that a judge cannot extend the time of an appellant for filing his case on appeal, except by consent, but consent is presumed if the order for an extension is filed, or is of record. *Woodworking Co. v. Southwick,* 119 N. C., 611; *Henry v. Hilliard,* 120 N. C., 479.

The Court will therefore set aside all the proceedings since the hearing upon the exceptions, and it is directed to hear and pass upon the defendant's exceptions, after notice to the parties, and to proceed thereafter according to law, and the course and practice of the court, and for this purpose we remand the case.

Remanded.

PER CURIAM. Under the circumstances of this case, we think the costs should be taxed against the defendant, and it is so ordered.

SUPERVISOR AND COMMISSIONERS OF PICKENS COUNTY, S. C., AND SUPERVISOR AND COMMISSIONERS OF OCONEE COUNTY, S. C., v. E. H. JENNINGS.

(Filed 18 May, 1921.)

1. **Negligence—Act of God—Waters—Floods—Dams—Contributing Cause.**

Where there is evidence tending to show that a lower proprietor on a stream has caused damage to his property by the breaking of the defendant's dam through his negligence, and, *per contra*, that it was caused by an unprecedented fall of rain in that locality, not to have been reasonably anticipated, the question of the defendant's liability is not whether the negligence of the defendant alone, without the aid of the flood, was insufficient to have caused the break in the dam and the resultant damage, but whether it contributed as a factor in producing it.

2. **Same—Concurrent Negligence—Proximate Cause.**

Where the act of God would not have produced damage to the plaintiff's property except for the concurrent negligence of the defendant, this negligence is considered as the proximate cause of the injury, which will hold the defendant liable for the damages sustained.

3. **Appeal and Error—Instructions—Conflicting Constructions—Reversible Error.**

Where parts of the instructions given by the court are materially in conflict, the jury is left in doubt as to the law applicable to the case, and it constitutes reversible error.

4. **Negligence—Ordinary Care—Rule of the Prudent Man—Distinctions.**

The law, as to what constitutes negligence is but the want of ordinary care, which is that degree of care that a man of ordinary prudence would use under the same or similar circumstances, the care in the particular case being proportionate to the danger, and not requiring that any particularizing distinction be drawn between its various degrees, or between negligence and gross negligence, in the instruction of the court.

5. **Evidence— Appeal and Error— Negligence— Act of God— Floods— Waters.**

Where the defendant is sued for damages for the negligent breaking of his dam, and there is evidence that it was caused by the act of God, testimony as to the rainfall in other localities not situated or connected with the same locality and watershed, is incompetent.

APPEAL by plaintiffs from *Long, J.*, at the Special October Term, 1920, of TRANSYLVANIA.

It is well in a case of this kind to so state the facts as to present alternatively the contentions of the parties, with such reference to the testimony as will serve to give a clear conception of them, and substantially using their language.

PLAINTIFFS' CONTENTION.

In 1902-1903 the Toxaway Company, a corporation, in which corporation the defendant was a stockholder, a director and vice president, built a dam 500 feet in length, approximately 60 feet in height, 260 feet at the base, with a crown of 26 feet, across the Toxaway River, which flows into Keowee River in South Carolina. This dam confined a body of water covering more than 640 acres, and varied in depth from 10 to 50 feet, and was more than 3,000 feet above sea level. The dam was built near the top of a rapidly declining shoal, and on a rock foundation. It was what is known as an earthen dam; it had no rock or cement core, and only had a small stone wall about 3 feet in width and 3 feet high, extending along a part of the foundation from about 75 feet on west side of stream to about same distance on east side of stream.

In stripping the rock foundation of growth and natural earth, an overhanging ledge of rock was found. It was along this ledge that one of the outflows of the dam first appeared, and where one of the breaks first occurred when the dam went out. This ledge was not removed, but remains today. No flood-gate or drain-gate was installed by which to let down the water in the lake if repairs should become necessary. During construction, after water had risen in the lake several feet, a spring of water appeared near the center of the dam and on the east side of the river. No investigation was made as to its source, but same was incased in rock and cement and piped out at the lower edge of the dam, and this flowed continuously as long as the dam was there, and when the dam went out, 13 August, 1916, the "mineral spring" went also, showing that water was coming from the lake and finding its way through the dam from the days of its construction to its end. One of the breaks which appeared when the dam went out was at this point.

Shortly after the dam was completed water began to make its appearance at the lower toe of the dam, at places other than that constituting the "mineral spring," as mentioned above, and when the dam broke the break was at those places from which the water had been flowing ever since the dam had been there. The percolating water increased in volume as long as the Toxaway Company owned the property. Slides appeared during these eight years, some of which were 30 feet in length, 8 to 10 feet in depth, cutting away a part of the crown or crest of the dam. These were filled in with earth as they would occur.

When the dam was completed, the crest of it was used as a public road for the traveling public, and at first cement gutters were placed along on each side of the public driveway to take care of the surface water, and down-drains on both sides of the dam were constructed to carry away the accumulated surface water during rains. A spillway sufficient to take care of all surplus water during extremes in the flood conditions was constructed around a hill covered with natural forest growth, the channel being through rock in part, and there was no obstruction placed in the spillway by the Toxaway Company.

The defendant, E. H. Jennings, a stockholder, a director, and at one time vice president of the Toxaway Company, became purchaser in July, 1911, of all the holdings of the Toxaway Company, including the dam in question. Shortly after he became the owner, a "drop-in," measuring 4 to 6 feet in diameter and 6 to 8 feet in depth, occurred at a point on the lower side of the dam, near the crest, and about over the place where the "spring," which became the "mineral spring," had its origin while the dam was being constructed. An examination of this "drop-in" by witness C. R. McNeely showed that the interior of the dam, for 15 or 20 feet in depth, was in a mushy or soggy condition. R. G. Jennings, a son of the defendant, who took charge of the Toxaway property after E. H. Jennings purchased it, was notified of this "drop-in" by C. R. McNeely, then a business partner of R. G. Jennings, at Lake Toxaway, and the expense connected with the repair was paid to McNeely by the partnership. Soon after the defendant purchased the property he had rock blasted from the hill a few feet from the east end of the dam, and this rock carried along the crest of the dam and dumped off on the lake side to prevent wave-action from cutting away the crest of the dam during high winds, the location of the dam being such as to be subjected to same at times. He also had cinders dumped into the lake, along the upper toe of the dam, supposedly to try to stop percolation of water through the dam. This, according to some of the witnesses, had a tendency to check the outflow at the lower toe for a short while, but it soon began to increase again, and kept on increasing as long as the dam stood, which was for five years after defendant bought it.

After defendant purchased the property, in order to get water from the lake with which to generate electricity to light Toxaway Inn and the premises around the lake, he built across the spillway a wall of rock about 26 inches high at the lowest place. This wall, according to some of the witnesses, raised the water in the lake when the power house was in operation (and this was about all the while during the tourist season each year), about 24 inches above the original water line. The margin between the water level in the lake and the crest of the dam was about 8 feet, the crest in the spillway being about 8 feet below the crest of the dam. In making the repairs with the rock above mentioned, the cement gutters and down-drains, to take care of surface water which fell on the dam during rains, were destroyed by workmen of the defendant, and by the traveling public, and were never replaced.

The defendant resides in Pittsburgh, Pennsylvania, and testified that he was at the dam, after purchasing it, not more than two or three times before it broke in August, 1916.

In 1908 the county of Pickens and the county of Oconee, in South Carolina, built a steel bridge across the Keowee River, twenty to twenty-five miles below Toxaway dam, which divides the two counties, each county paying one-half the expense, and the same was built for and used by the public, and paid for out of the public funds of each of the counties. This bridge was in good condition, well constructed, and of sufficient height above water to be safe from all expected floods, being about 25 feet above normal flow of river, and about 9 feet above any previous high water on said river. To replace it within a reasonable time after its destruction by the breaking of Toxaway dam, on 13 August, 1916, would have cost between $6,000 and $7,000.

Plaintiffs also relied on certain evidence as to the poor condition of the dam from the time the defendant took charge of it until it gave way, and contended that there was no appreciable rain at the lake for about four weeks after the great rainstorm of July, 1916, allowing the water full time to flow by the lake into the river below, where it did no harm.

DEFENDANT'S CONTENTION

This is an action for damages alleged to have resulted from the breaking of the dam at Lake Toxaway, in Transylvania County, on 13 August, 1916. Lake Toxaway, an artificial lake formed by damming the waters of Toxaway River, was built in 1902 and 1903 by a corporation known as the Toxaway Company, in connection with the development by said company of a large boundary of land as a pleasure resort, the waters of the lake having been used primarily for the pleasure of the guests and tenants of the company in boating and fishing, and in addition thereto, by the defendant after his purchase of the property, for power purposes.

In 1911 the Toxaway Company defaulted in the payment of certain of its bonded indebtedness, and the property was foreclosed in a foreclosure proceeding in the United States District Court for the Western District of North Carolina; the defendant having become the purchaser of the property at the foreclosure sale, and being owner of the lake and dam at the time of its destruction, on 13 August, 1916.

The plaintiffs are two counties of South Carolina, and at the time of the break were the joint owners of a bridge built across Keowee River in South Carolina, and into which the waters of Toxaway River emptied. The high water resulting from the break of the Toxaway dam practically destroyed the bridge.

The plaintiffs allege:

1. Negligence on the part of the Toxaway Company in the construction of the dam, as well as negligence on the part of the said company by reason of its failure to properly maintain and keep in repair the dam during the period of the company's ownership, and seek to fix this defendant with liability for the alleged negligence of the Toxaway Company in that respect.

2. Negligence on the part of the defendant Jennings in that he failed to properly maintain and keep in repair the dam during the period of his ownership.

The allegations of the plaintiffs, both as to negligence on the part of the Toxaway Company and on the part of the defendant, are denied in the answer, and by way of further defense the defendant pleads an act of God, to wit, the unusual, unprecedented, and unforeseen conditions created in western North Carolina, in the vicinity of Lake Toxaway, by the unprecedented, unusual, and unforeseen rainfall in said area from 16 July until the breaking of the dam on 13 August, 1916. This condition of the earth being described by the engineers, who testified in the case, as super-saturation, causing an unprecedented increase in the hydrostatic pressure in the area at and around Lake Toxaway, to an extent that no human agency could have been expected to foresee or be required to provide against any such conditions, even had an adequate provision been possible.

Over a period of thirteen years the dam withstood all weather conditions without indication or evidence of weakness or defect, and finally, under conditions, the like of which no living man now remembers, failed to perform its proper functions.

The court, at the request of the plaintiff, and among other instructions, gave the following to the jury:

"No. 15. The court charges you that if you shall find that there was heavy rainfall in the locality where this lake and dam in question were located, such as could not have been reasonably anticipated or expected, and shall further find that the defendant himself did not use all available means that a reasonably prudent man would have used to make the dam safe, and shall further find that by reason of his lack of prudence, care, skill, and pains, coupled with heavy rainfalls, such as could not have been expected or anticipated, the dam broke, then the court charges you that this defendant would be liable for such damage as the plaintiffs have shown, provided the damage alleged was the proximate result of defendant's negligence. The general rule of law in regard to this question is that if damage is caused by the concurring force of the defendant's negligence, and some other cause for which he is not responsible, including the 'act of God,' the defendant is nevertheless responsible if his negligence is one of the proximate, concurring causes of the damage. And where loss is caused by the 'act of God,' if the negligence of the defendant mingles with it, as an active, coöperative, and concurring cause, he is still responsible. An unprecedented rainfall and resulting flood, to excuse liability as an 'act of God,' must not only be the proximate cause of the injury, but it must be the sole cause. If the injury caused by the act of God would not have occurred except for the negligence of the defendant coöperating therewith, as an efficient and contributing concurrent cause, the defendant will be liable in damages."

The court, also, at the defendant's request, gave the following instruction:

"No. 11. The fact, if you so find, that the defendant was negligent, standing alone, is not sufficient to justify a recovery by the plaintiffs; such negligence must have been the proximate and efficient cause of the injury; and if you find from the evidence that there was at the dam, and in its vicinity, for a period prior to the break, an excessive, extraordinary rainfall, a rainfall which an ordinary prudent man, under the same circumstances and conditions, and in the same relation to the dam, would not have expected, and further find that had it not been for such rainfall the negligence of the defendant would have produced no damage to the plaintiffs, then the defendant would not be liable."

Exception was duly taken by the respective parties to each of these instructions.

The court submitted two issues, as to negligence and damages. The jury rendered a verdict for the defendant, answering the issue of negligence "No." Judgment thereon, and appeal by the plaintiffs.

Welch Galloway, E. L. Herndon, James S. Carey, Jr., and McKinley Pritchard for plaintiffs.

W. E. Breese, D. L. English, Charles B. Deaver, and Merrimon, Adams & Johnston for defendant.

WALKER, J., after stating the case: It was properly conceded that if the defendant, by his negligence, contributed substantially and proximately to the destruction of the dam at Toxaway Lake, he would be liable in damages to the plaintiffs, but the defendant contends that he did not do so, and that the damage to plaintiffs was caused by the unprecedented flood of that season, which could not be foreseen or restricted by him, and to which the dam succumbed, without any fault on his part.

There are many exceptions in this case, but it will not be necessary for us to consider more than two or three of them, as the others may not be presented hereafter.

It is our opinion that there was error in giving the instruction requested by the defendant, and indicated above as No. 11, and especially when, at the plaintiff's request, the court gave another instruction, No. 15, which is apparently in conflict with it, thereby leaving the jury in doubt as to the law applicable to the case. The seeming likeness of the two may have misled the court into the error, but when they are carefully examined and compared it will be found that there is an essential difference, which cannot be reconciled. Taking up first the defendant's prayer, the question was not whether the negligence of the defendant alone, or of itself, and without the aid of the rainstorm, was insufficient to have caused the break in the dam and the resultant damage to the plaintiff, but whether it contributed, as a factor, in producing the damage. The principle, as applicable to this case, is thus stated in Shearman & Redfield on Negligence, vol. 1 (Street's Ed.), p. 76, sec. 39: "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the 'act of God' or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury, in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force which, concurring with his own negligence, produced the damage." We adopted and applied this well settled rule in *Stone v. Texas Co., Fox v. Same,* and *Newton v. Same,* all reported in 180 N. C., at pp. 543-568 (explosion cases), citing *Rwy. Co. v. Cummings,* 106 U. S., 700 (27 L. Ed., 266); *Ridge v. R. R.,* 167 N. C., 510. Several illustrations of this doctrine are given in *Stone's case,* 180 N. C., at pp. 564-5, where we further held that where there are two causes cooperating to produce an injury, one of which is attributable to defendant's negligence, the latter becomes liable, if together they are the proximate cause of the same, or if defendant's negligence is such proximate cause, citing *Ridge v. R. R., supra,* and *Steele v. Grant,* 166 N. C., 635. *Chief Justice Waite* said in the *Cummings case, supra,* that if the negligence of the defendant contributed to the injury, it must necessarily be an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong. It appeared in *Dickinson v. Boyle,* 17 Pick. (Mass.), 78, that the defendant had wrongfully placed a dam across a stream on plaintiff's land, and allowed it to remain there; being swept away by a freshet in the stream, the rush of water damaged plaintiff's property, and it was held that defendant was liable. The wrong there, it is true, consisted in the placing the dam on the plaintiff's land, while the wrong alleged here is in negligently building and maintaining a dam on defendant's own land, but the difference in the particular nature of the wrong does not, in law, distinguish the two cases, but they will not, of course, be alike unless the jury find from the evidence that defendant was guilty of negligence, as that is the basic fact upon which the plaintiff's case must rest. If there was no negligence, it follows that there was no wrong, or if there was negligence, but it had nothing to do with the destruction of the dam, which, on the contrary, was caused by an unprecedented rainstorm, or by some other cause for which the defendant was in no degree responsible, he would not be liable. He is fixed with liability when, by his own negligence or in conjunction with that of another, he has brought himself within the condemnation of a favorite maxim of the law, which enjoins that a man should so use his own property as not to injure that of another. Blackstone, 306.

Counsel discussed before us at some length the difference between ordinary care, the highest degree of care and gross negligence, but we deem it unnecessary to draw any distinction between them. It is all but ordinary care, which means that degree of care which a man of ordinary prudence would use in the same or similar circumstances. It must be that more care is required as the danger increases, and the degree of care in the particular case must be proportioned to the danger. We cannot do better than refer to the case of *Milwaukee R. Co. v. Arms,* 91 U. S., 489 (23 L. Ed., 374), where *Justice Davis* discusses this question: "If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned. Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redf. Car., p. 376. *Lord Cranworth,* in *Wilson v. Brett,* 11 M. & W., 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. *Beal v. R. Co.,* 3 H. & C., 337; *Grill v. Gen. Iron Screw Collier Co.,* 3 R., 1 C. P., 1865-66, p. 600, were heard in the Common Pleas on appeal. One of the points raised was the supposed misdirection of the *Chief Justice* who tried the case, because he had made no distinction between gross and ordinary negligence. *Justice Willes,* in deciding the point, after stating his agreement with the dictum of *Lord Cranworth,* said: 'Confusion has arisen from regarding negligence as a positive instead of a negative word.' It is really the absence of such care as it was the duty of the defendant to use. Gross is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent—a want of due care and skill in navigating the vessel—which was again and again used by the *Lord Chief Justice* in his summing up. 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but, after all, it means the absence of the care that was necessary under the circumstances."

No better standard has yet been devised than the care of the "ordinarily prudent man."

There were numerous questions argued before us, more or less involved in the controversy. They may not arise again, or, if they do, not in the same way, nor with respect to the same facts, and we, therefore, pretermit a discussion of them and will rest content with those we have considered, with one exception.

There is a question of evidence in the case. The court allowed the plaintiff to introduce certain reports as to the state of the weather at other places than Toxaway. These were not relevant to the issues which related only to the rainfalls at Toxaway Lake or in its vicinity or within its watershed, as tending to show how that stream was affected thereby. It could make no difference how many, or how few, rains fell at other places if they had no effect on Toxaway River or Lake, nor do we see how the engineer in constructing the dam could rely with any degree of certainty on how much or how often rain would fall at Toxaway by estimates based upon rains in other sections of the State. This, we think, should be excluded, unless its relevancy hereafter more clearly appears.

For the reasons stated another trial must be ordered.

New trial.

C. C. LANTZ v. ALDEN HOWELL ET AL.

(Filed 25 May, 1921.)

Deeds and Conveyances—Warranty—Breach of Warranty—Description—Reference to Prior Deeds—Maps—Actions.

Where a deed to a large body of lands, definitely known as certain lands, excludes from the conveyance those of persons holding parts thereof under superior title, and thereafter is referred to in another deed for more full or particular description, together with a map showing the lands excluded, both the former deed and the map are to be taken as a part of

the description in the later deed in the chain of the purchaser's title thereunder, and the purchaser may not recover damages for the lappage in an action brought upon the breach of warranty.

APPEAL by plaintiff from *McElroy, J.,* at February Term, 1921, of BUNCOMBE.

This is an action to recover damages for an alleged breach of covenant of seizin for defect of title as to 98.6 acres in a tract of land. The defendants executed to the plaintiff a conveyance for several tracts of land, and the plaintiff alleges that as to a portion of the first tract of land therein recited there is a defect of title as to 98.6 acres. Upon the agreed statement of facts the court rendered judgment against the plaintiff, and he appealed.

Merrimon, Adams & Johnston for plaintiff.
Smathers & Ward for defendants.

CLARK, C. J. This is not an action for a shortage in the acreage as to which the plaintiff could not recover (in the absence of fraud), unless he had taken a warranty as to the acreage; *Galloway v. Goolsby,* 176 N. C., 638, citing *Smathers v. Gilmer,* 126 N. C., 757; *Stern v. Benbow,* 151 N. C., 462, and other cases; nor is it a purchase by the acre as to which the plaintiff could recover for overpayment by mistake. *Henofer v. Realty Co.,* 178 N. C., 584, and cases there cited. But the plaintiff here contends that there is a defect of title as to 98.6 acres in one of the tracts herein contained, and he demands payment for breach of warranty of title to that extent.

The defendants, however, contend that the conveyance recites the boundary of the tract conveyed, and specifies as to this first tract that it was "The land known as the L. C. Glock lands, embraced in State grants Nos. 10181 and 10182, the first of which had been granted by the State to J. O. Tabor, 3 August, 1890, and the latter to H. C. Tabor, 15 November, 1890, containing together 1,250 acres, more or less, as per survey of J. S. Keener, surveyor, and being the same lands conveyed by T. V. Shope, administrator of L. C. Glock, to Charles D. Fuller, 18 May, 1903, which deed was duly recorded in the office of the register of deeds of Swain, in Book X, page 298, 19 May, 1903, to which deed and record reference is made for further description and particulars." A specific description by metes and bounds of those two grants were not set out in the deed, but the defendants admit that these grants covered the 98.6 acres shown on the map. The description in the deed purports only to cover such land embraced in these two grants as was "known as L. C. Glock land, as per survey and location by J. S. Keener, surveyor." The plaintiff admits in the case agreed that he had been given with the deed a map of the Keener survey, and this map is set out in the record and being referred to in the description of the deed, becomes a part of the deed and description, and taken together they show conclusively that the said lappage of 98.6 acres was not embraced in the land conveyed. A map of survey referred to in a deed becomes a part of the deed. *Nash v. R. R.,* 67 N. C., 413; *Collins v. Land Co.,* 128 N. C., 563; *Lance v. Rumbough,* 150 N. C., 19. This map shows the 98.6 acres in the boundary indicated by heavy red lines, and it excludes from its general boundary the lappage, 98.6 acres, which the plaintiff now claims to be covered by the conveyance to him.

The lands conveyed were contracted to be conveyed to the plaintiff under a contract, February, 1913, providing that the plaintiff should purchase the same at a price of $21 per acre upon a survey to be made by surface measurement, but that in the event the lands were not surveyed by plaintiff by 18 March of said year, the plaintiff was to accept the same upon an acreage of 1,806 acres. The agreement described the lands as being the tract conveyed to the defendants by deed from Charles D. Fuller and wife, 15 November, 1904, recorded in Book Z, page 395, record of deeds of Swain, and that conveyances recites the conveyance in the same words as those used in the conveyance by the defendants to the plaintiff, and adds this: "The said parties of the first part guarantee that there are 1,250 acres of land within the boundary lines of the two grants aforesaid, belonging to said Charles D. Fuller, after excluding all the tracts on the inside of the said two grants belonging to other parties holding the same under older and superior titles to that of grants Nos. 10181 and 10182 aforesaid."

It thus appears that the lands contracted to the plaintiff were the lands known as "the L. C. Glock lands" embraced in State grants Nos. 10181 and 10182, all lands held by older and superior titles lying within said two grants being specifically excluded, as per survey by J. S. Keener, this exclusion being shown both by the contract and by the map. The plaintiff Lantz was put on notice that the grantor did not contract to convey any land inside said Tabor lands held by older and superior title, and the Keener map, which he had in hand, pointed out to him what these lands were which were held by any older and superior title. He looked over the lands with his surveyor and carefully investigated the lands and boundaries, and having decided that the acreage of 1,806 (after excluding this 98.6 acres) was correct, he accepted the deed without a survey, and the deal was closed accordingly. He admits that he did not pay for the lands embraced in this lappage, and in view of the explicit terms of the contract, of the deed, and in the recitals in the deed to the defendants, which were referred to in their conveyance to the plaintiff, and which were on record and made a part of the conveyance to the plaintiff, the court properly held that both the grantor and grantee understood that the older and superior titles embraced within the Tabor grants were excluded from the boundary conveyed to the plaintiff. The lower court properly adjudged that the plaintiff was not entitled to recover.

Affirmed.

WACHOVIA BANK AND TRUST COMPANY v. J. W. CRAFTON.

(Filed 25 May, 1921.)

Negotiable Instruments—Endorsement—Independent Contracts—Gaming—Holder in Due Course—Statutes.

The endorsement on a promissory note, negotiable under our statutes, is a new and independent contract, whereby the endorser for value and in due course, among other things, guarantees under C. S., 3047, that he was a holder in due course at the time of the endorsement, and that the obligation is valid and subsisting; and the endorsee may maintain his action thereon against the endorser independently of whether the note was originally given for a gambling debt made void by C. S., 2142.

APPEAL by plaintiff from *Long, J.*, at December Term, 1920, of BUNCOMBE.

The action is brought by an endorsee and holder in due course of a promissory note given by one J. M. Carver to J. W. Crafton, defendant, for money won by the defendant in a game of cards and endorsed by the defendant, the payee of the note, in due course and for value to plaintiff bank. There was denial of liability, the defendant, the endorser, alleging that the note in question was for an amount won in a gambling transaction.

The jury rendered the following verdict:

"1. Did the defendant Crafton endorse the note declared on for $700, 18 February, 1919, due 8 April, 1919, as alleged in the complaint, and before its maturity? Answer: 'Yes.'

"2. Did the plaintiff discount and pay $690 for the note to W. E. Shuford, in regular course, without notice that it was for a gambling debt, and before maturity, as alleged by plaintiff? Answer: 'Yes.'

"3. Was the note executed by J. M. Carver for a gambling debt to J. W. Crafton? Answer: 'Yes.'"

On the verdict there was judgment that defendant go without day, and plaintiff bank excepted and appealed.

Bourne, Parker & Jones for plaintiff.
Marcus Erwin for defendant.

HOKE, J. Our statutes applicable to the note in question, C. S., 2142, renders this and all notes and contracts in like case void, and it is urged in support of his Honor's ruling that, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. *Glenn v. Farmers Bank,* 70 N. C., 191; *Calvert v. Williams,* 64 N. C., 168; *Sabine v. Paine,* 223 N. Y., 401, reported also in 5 A. L. R., 1444. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. It is very generally held, uniformly as far as examined, that this contract of endorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification and for value it guarantees to a holder in due course among other things that the instrument, at the time of the endorsement, is a valid and subsisting obligation. It is so expressly provided in our statutes on negotiable instruments, C. S., ch. 58, sec. 3047, and the statute, in this respect as in so many of its other features, is but a codification of the general principles of this branch of the mercantile law as established in the better considered decisions on the subject. *Hunnum v. Richardson,* 48 Vt., 508; *Aymar v. Sheldon,* 12 Wendell, 339; *Sinker, Davis & Co. v. Fletcher et al.,* 6 Ind., 277; 4 A. & E. (2 ed.), p. 477; Norton on Bills and Notes, p. 217; 1 Calvert Daniel on Negotiable instruments, sec. 669. In 4 A. & E., *supra,* it is stated: "That no principle is more fully settled or better understood in commercial law than that the obligation of the indorser is a new and independent contract." And in Norton on Bills and Notes it is said that "every indorser who indorses without qualification warrants to his indorsee and to all subsequent holders," among other things, "that the bill or note is a valid and subsisting obligation." In applying these principles, the cases hold that on breach of the contract of indorsement a recovery by a holder in due course will be sustained against the indorser though the instrument is rendered void by the statute law. *Irvin v. Marquiett,* 26 Ind. App., 383; *Morford v. Davis,* 28 N. Y., 481; *Horowitz v. Wollowitz,* 110 N. Y. Supp., 972; *Moffett v. Bickle,* 62 Va., 280; *Graham v. Maguire,* 39 Ga., 531; *Edwards v. Dick,* 6 Eng. C. L., 405; 1 Valvert Daniel on Negotiable Instruments, sec. 373. In *Irvin v. Marquiett, supra,* in denying recovery on the note the Court said: "It is the law that in a suit by a *bona fide* holder against an indorser the latter cannot defend on the ground that the original contract was based on a gaming consideration, for the reason that the indorsement is a separate and independent contract, and the indorser by his indorsement warrants the validity of the original contract," citing many authorities. In the citation to Calvert, Daniels on Negotiable Instruments, sec. 673, the author says: "The indorser engages that the bill or note is a valid and subsisting obligation, binding all prior parties according to their ostensible relations; and he may be held liable, although the instrument be entirely null and void as between prior parties themselves; and also as between prior parties and even *bona fide* holders without notice," and quotes from an English case which C. J. Lee, in denying recovery on the note void for gaming said: "The plaintiff is not without remedy for he may sue the indorser on his indorsement." The law which renders these contracts void was enacted for the suppression of gambling, but it would tend rather to encourage the vice if a successful gambler could procure the value of such a note on his indorsement and protect himself from the obligation so incurred by pleading his own wrongdoing. On both reason and authority, therefore, the defendant should be held liable for breach of his own contract of indorsement, and under the facts established by the verdict, there should be judgment for plaintiff.

Reversed.

SETH B. BAUGHAM v. TRUST COMPANY.

(Filed 25 May, 1921.)

1. **Wills—Estates—Contingent Interest—Time of Happening of Contingency.**

A devise of lands to the testator's children depending upon their dying with issue, and in the event they should not leave issue to the heirs of the testator, is construed to take effect upon the death of the testator.

2. **Same—Beneficiaries—Heirs at Law—Relinquishment of Right—Fee Simple.**

Where the testator's children are his heirs at law, and a devise of lands is to them, and if any should die without issue to the heirs at law of the testator, the children of the testator may waive the condition by proper proceedings had among them all, and each acquire an indefeasible fee to a division of the lands among themselves.

3. **Partition—Title—Judgment—Estoppel.**

While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them.

4. **Descent and Distribution—Estates—Contingent Remainders.**

A contingent remainder, or like interest in lands is transmissible by descent.

5. **Wills—Estates—Contingencies—Remainders—Reversion—Children—Heirs at Law—Division in Severalty—Relinquishment of Right—Fee.**

Where the children of the testator are his heirs at law, and take by will upon the contingency of their having children at the death of the testator, whether they take in remainder or a reversionary interest as the heirs of the testator, is immaterial upon the question of their right to apportion the lands by proper proceedings among themselves, and thus acquire a fee-simple title to the lands accordingly held by them in severalty.

APPEAL by defendant from *Allen, J.*, from judgment on case agreed, rendered March, 1921, from BEAUFORT.

This is a controversy submitted without action on an agreed statement of facts, and the single question presented is whether Seth B. Baugham is the owner of the indefeasible fee in the lot of land described in the agreement of the parties.

W. P. Baugham, who was the former owner of this and other lands, died in 1910, leaving a will, the third item of which is as follows:

"3d. Should I die without leaving any children or child surviving me, or should my children die without surviving them any lawfully begotten children or issue, should one or more die without legal issue, the remaining ones to share in that one's or their interest in my estate, share and share alike. Should all of my children die leaving no lawfully begotten issue, then in that case I give, devise, and bequeath all of my said property to my heirs at law, said heirs to be determined by the laws of the State of North Carolina."

At the time of his death the said W. P. Baugham left surviving him Mary A. Baugham, widow; William E. Baugham, Seth B. Baugham, Pattie B. McMullan, Christine C. Baugham, and Mary Baugham (James H. Baugham, one of the children of W. P. Baugham, deceased, having died intestate, without issue, in July, 1918), all of whom joined in a petition for partition in which there was the following allegation:

"That your petitioners, Pattie B. McMullan, William E. Baugham, Seth B. Baugham, Christine C. Baugham, and Mary Baugham, desire to own their respective interests in the said lands, described in section two hereof (which includes the *locus in quo*), in severalty, in fee simple, absolutely free from the limitation over to them, respectively, in case of the death of any without leaving surviving children, as set forth in the will of W. P. Baugham, deceased, and your petitioner, Mary A. Baugham, consents to the said division upon the express condition as follows: (Sets forth conditions as to payment of her annuity not here involved.)

"The clerk of the Superior Court, in ordering the partition of the said lands, adjudged that the same should be divided in accordance with the above stipulation, and the decree of the said clerk has been duly confirmed by the judge."

The lot involved in this controversy was allotted in said proceeding to Seth B. Baugham.

His Honor held that Seth B. Baugham was the owner of the lot in fee simple absolute, and the defendant excepted and appealed.

Harry McMullan for appellee.
Daniel & Carter for appellant.

Allen, J. The land in controversy and other lands are devised in the will of William B. Baugham to all his children, with provision that if one or more die without issue the interests of such children so dying shall vest in the survivors, and if all the children die without issue, *then* to the *heirs of the testator.*

The first contingency—"if one or more die without legal issue"—is disposed of by the partition proceedings, to which all the children were parties, and in which the right of survivorship in the event one or more dies without issue is mutually surrendered and released.

It was held in *Beacom v. Amos,* 161 N. C., 357, that a similar condition could be eliminated by deed, and, while usually a partition proceeding only operates as a severance of the unity of possession, the parties may put the title in issue, and when they do so the adjudication of title is binding and final between the parties. *Weston v. Lumber Co.,* 162 N. C., 180.

It follows, therefore, that the plaintiff, Seth B. Baugham, is the owner in fee simple absolute of the share allotted to him, unless his estate is made defeasible by the limitation to the heirs of the testator upon the death of all the children leaving no issue, and the decision of this question depends on the time when the heirs of the testator are to be ascertained.

In 40 Cyc., 1481, authorities from twelve states and from England and Canada are cited in support of the text that, "As a general rule the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives, unless the context of the will indicates a clear intention that the property shall go to the heirs, next of kin, or other relatives at a different time, such as at the time of distribution, or at the death of the first taker, or at the date of the execution of the will. . . . Where the gift is to the heirs or next of kin of another than the testator it ordinarily refers to the death of such other, unless the context of the will manifests that the class shall be determined at a different time, such as at the time of distribution." *Wright v. Gooden,* 11 Del., 414; *In re Kenyan,* 17 R. I., 149, and *Stokes v. Van Wyck,* 83 Va., 724, are learned and well considered cases supporting the text, although overlooked in *Burden v. Lipsitz,* 166 N. C., 523.

This distinction is clearly recognized in our own decisions. *Newkirk v. Hawes,* 58 N. C., 268; *Wool v. Fleetwood,* 136 N. C., 471, being cases in which it was held that in a limitation to the heirs of the testator the heirs must be determined as of his death, and the principle was approved in *Jenkins v. Lambeth,* 172 N. C., 468, in which it is said: "It is undoubtedly the general rule that when a testator, after a prior limitation of his property by will, makes, in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined on as of the time of his death. This is not only the primary meaning of the word heirs, but the position is said to be favored by the courts because in its tendency it hastens the time when the ulterior limitation takes on a transmissible quality. *Newkirk v. Hawes,* 58 N. C., 265; *Rives v. Frizzle,* 43 N. C., 237; *Jones v. Oliver,* 38 N. C., 269; *Welch v. Blanchard,* 208 Mass., 523; *Wallace v. Diehl,* 202 N. Y., 156, reported also in 33 L. R. A., N. S., pp. 1 and 9, where the general question is treated in a full and instructive note by the editor."

It was also held in the *Newkirk case* that "a contingent remainder, or any such contingent interest in land, is transmissible by descent."

It is true that the limitation to the heirs of the testator is referred to in some of the cases as a remainder to the heirs, and in others as a reversion left in the testator (see authorities cited in *Thompson v. Batts,* 168 N. C., 335), but since the reversion would pass to the heirs by descent, this does not have any effect upon this title as the same persons take the same estate whether as remaindermen or as heirs of the reversion, and applying the principle that the heirs of the testator must be ascertained as of his death, unless a contrary intent appears in the will, we find that the first takers of the estate are all the children of the testator, who are also all of his heirs in whose favor the ultimate limitation is made if they take as remaindermen under the will, or who would take as heirs if a reversion was left in the testator, and thus in any event the whole estate, defeasible and indefeasible, was vested in the parties to the partition proceeding as children and heirs, and if so, each child takes the share allotted to him in fee simple absolute.

We are therefore of opinion the title of Seth B. Baugham is indefeasible.

Affirmed.

FRANK H. MARSHALL v. INTERSTATE TELEPHONE AND TELEGRAPH COMPANY AND DURHAM TRACTION COMPANY.

(Filed 3 June, 1921.)

Appeal and Error—Objections and Exceptions—Negligence—Evidence Admitted Without Objection—Questions for Jury—Trials.

The principle upon which an exception to the admission of evidence is untenable when such has theretofore been admitted without objection, has no application when the testimony excepted to is incompetent as an invasion of the province of the jury to ascertain a fact at issue as to the defendant's actionable negligence, and that formerly admitted relates to notice of defendant of the conditions existing at the time. (STACY, J., on petition to rehear.)

PETITION by plaintiff to rehear, case decided at this term, *ante*, p. 292.

Brawley & Gantt for petitioner.
Bryant & Brogden, W. L. Foushee for Traction Company.
Fuller, Reade & Fuller for Telephone Company.

STACY, J. This case was before the Court at the present term, and a new trial awarded for error in the admission of incompetent opinion evidence. The plaintiff files a petition to rehear and asks that the former decision be reversed and that the judgment of the Superior Court on the verdict be affirmed.

It was alleged in the complaint, as one of the main grounds of actionable negligence, and denied in the answer, that the defendants had failed to furnish the plaintiff, an employee, a reasonably safe place to work. Chester Whitaker, a witness for the plaintiff, who had examined the place on Vickers Avenue where the injury occurred, was permitted to testify, over objection, that in his opinion the conditions, as he found them some thirty or forty minutes after the injury, were not safe. This was the very question the jury was to determine. The plaintiff now says that the admission of this evidence should not be held for reversible or prejudicial error because the same witness, previously and without objection, had been allowed to testify as follows:

"I had notified the telephone company and the traction company about the general condition where the two lines occupy the same side of the street. There are several conditions like that in the city. It was these that I called their attention to. I have no record of having mentioned Vickers Avenue or any other place, but the general condition. I just notified them about the condition where they both occupied the same side of the street. Where the two systems are brought closer together than is safe. I have a copy of a letter that specifies some location, but Vickers Avenue is not on it. I told Mr. Conrad about it. Mr. Conrad was superintendent or manager."

It has been held with us, in a number of cases, that where the testimony of a witness has been given without objection a subsequent exception to the same evidence will not avail. *Beaver v. Fetter,* 176 N. C., 335; *Tillett v. R. R.*, 166 N. C., 520; *Smith v. R. R.,* 163 N. C., 146; *Young v. R. R.,* 157 N. C., 78; *Proctor v. Finley,* 119 N. C., 541.

But it will be observed that, in the instant case, the previous testimony of the witness Whitaker is not the same as that to which the defendants objected and excepted. It was competent for him to say that he had notified the defendants of certain conditions, which he considered unsafe, as tending to show that the matters had been brought to the attention and knowledge of the defendants. The hurtful part of his evidence was the opinion he gave to the jury, under oath, and not what he had said to the defendants out of court and on some other occasion.

In passing, it may be noted that the position now urged by the plaintiff was omitted in his brief when the case was argued on the original hearing. All material exceptions, not abandoned by appellants, should be considered with care, and counsel should call the Court's attention to such portions of the record as tend to sustain the validity of the trial.

After a further investigation and examination of the case, I think the plaintiff's petition to rehear should be denied, and it is so ordered.

Petition denied.

W. P. INGRAM AND WIFE v. YADKIN RIVER POWER COMPANY.

(Filed 3 June, 1921.)

Appeal and Error — Trials — Damages — Instructions — Agreement of Counsel.

Where the plaintiff in his action seeks to recover damages of the defendant for injury to his land in ponding water upon it by the erection of a concrete and of a flash dam, and it appears to the Supreme Court, upon a return to a writ of *certiorari* ordered on a former hearing, that the plaintiff abandoned on the trial any claim for damages from the erection of the concrete dam, no error will be found in an instruction to the jury to that effect.

APPEAL by plaintiffs from *McElroy, J.,* at September Term, 1920, of RICHMOND.

This was an action to recover damages for ponding water against and sobbing lands of the plaintiffs by reason of the defendant's concrete dam and flash dam at Blewett's Falls on the Pee Dee River. Verdict and judgment for defendant. Appeal by plaintiffs.

W. R. Jones and Stack, Parker & Craig for plaintiffs.

Robinson, Caudle & Pruett, Thomas & Phillips, F. W. Bynum, Jas. H. Pou, and W. L. Currie for defendant.

CLARK, C. J. There being an apparent irregularity in settling the case on appeal, on motion of plaintiffs the record was remanded to the judge, with leave to amend the statement of the case, in an opinion by *Stacy, J.*, at this term. The case now comes up before us on the return to the *certiorari*.

The plaintiff in his brief relies upon the assignments of error 5 and 6. No. 5 is that the court refused to submit the issue as tendered by the plaintiff, "Was the land of plaintiffs injured by the maintenance of the dam and flash dam of the defendant as alleged in the complaint?" but divided it, submitting the question of injury by the concrete dam and flash dam under separate issues. No. 6, the other assignment of error relied on, is that the court charged the jury that there was no evidence that the lands of the plaintiff were injured by the erection and maintenance of the defendant's "concrete dam," and instructed the jury to answer the issue "No."

The court makes return to the *certiorari* as follows: "In obedience to the suggestion of the Supreme Court for a more definite finding of fact touching the abandonment by the plaintiffs of claim for damages resulting from the erection and maintenance of the concrete dam, the court finds the following facts:

"That after the plaintiff, W. P. Ingram, and his witness, A. F. Lyman, had testified that the back water from the concrete dam stopped at or near Coleman's Mill, a distance of one and one-half miles below plaintiff's premises, and plaintiff had further testified that no damage had been done to his crops or lands prior to the erection of the flash dam, the court inquired of counsel for plaintiffs if they contended that the plaintiff's premises had been injured by the erection and maintenance of the concrete dam, and counsel replied that *they did not claim* that the lands or crops of the plaintiffs had suffered any injury prior to the erection of the flash dam, the trial thereupon proceeded on the theory and with the understanding upon the part of the court that the plaintiffs did not make any contention that they had been damaged by the erection and maintenance of the concrete dam, but that their damages, if any they had sustained, resulted from the erection and maintenance of the flash dam."

"The appellant cannot be allowed in this Court to maintain a position inconsistent with or directly antagonizing the basic facts of his own suit or question orders which the Court has made in furtherance of his own application," or admissions on the trial below. *Lipsitz v. Smith,* 178 N. C., 100, quoting *Brown v. Chemical Co.,* 165 N. C., 421; *R. R. v. McCarthy,* 96 U. S., 258; *Bank v. Dovetail,* 143 Ind., 534. To same purport, *King v. R. R.,* 176 N. C., 306.

The plaintiffs, having abandoned on the trial any claim for damages arising from the erection of the concrete dam, cannot be heard to assert on appeal that it was error in the court to instruct the jury to that effect.

On the above finding of fact we must adjudge that there has been No error.

FRANK LITTLE v. M. C. HOLMES ET AL.

(Filed 3 June, 1921.)

Abduction—Actions—Parent and Child—Damages—Loss of Service—Mental Anguish.

An action will lie in behalf of the father against one who has induced his minor sixteen-year-old daughter to leave her home, against his will, in his absence and against the protest of his wife, who was then present, though with the consent of the daughter; and where the intent and result is marriage, he may recover damages against the abductor upon sufficient evidence for the loss of his daughter's services between the time of her abduction and that of her marriage, and for the mental anguish he has sustained, or for either one or both as the case may be.

APPEAL by defendants from *McElroy, J.,* at August Term, 1920, of UNION.

This was an action for the abduction of plaintiff's sixteen-year-old daughter from his home by the defendants. Verdict and judgment for plaintiff. Appeal by defendant.

F. W. Ashcraft, Stack, Parker and Craig for plaintiff.
Maness, Armfield & Vann for defendants.

CLARK, C. J. In the absence of the plaintiff from his home on 14 January, 1919, the defendants, M. C. and Baxter Holmes, went to his house and carried away his sixteen-year-old daughter in an automobile to South Carolina where she was married to Henry Griffin. This was done against the earnest protest of the plaintiff's wife. The defendant M. C. Holmes hired the car and was driving it. Baxter was on the front seat with him. They came up to the plaintiff's home by the back way. The plaintiff's wife missed her daughter, went to the door and saw her getting into the car. The mother then ran out to the car and pleaded with her daughter not to go. She was crying. The defendants said that they were just going to Monroe. The mother cried and wept, and the defendants "went so fast that they did not look back." The plaintiff got a car and left for Chesterfield, S. C., and telephoned there forbidding the issuance of marriage license. When the plaintiff saw the defendant Holmes he complained to him of this treatment and he grossly insulted the plaintiff. The father then searched for and found Griffin and his daughter in a negro house. Griffin struck the plaintiff twice with an iron poker, beat and bruised the plaintiff until he was unconscious, and then fled with the plaintiff's daughter. Griffin is not a party to this action, which is solely against Baxter and Craig Holmes for the violence and abduction in carrying off plaintiff's daughter from his home. Baxter Holmes went with Griffin to Monroe to get the marriage license and swore that the girl was eighteen years of age when the testimony is that she was barely sixteen. There was evidence as to the plaintiff's mental anguish caused by the conduct of the defendants.

The defendants abandoned all exceptions except as to the refusal to nonsuit; the refusal to charge that the evidence disclosed no cause of action; the refusal to charge that the plaintiff's evidence did not warrant more than nominal damages, and to the following paragraph in the charge: "The plaintiff would be entitled to recover, if entitled to recover at all, such damages as are a reasonable compensation for the mental anguish suffered by plaintiff by reason of the abduction of his daughter, if the jury find that he suffered mental anguish as a result thereof."

As to the first two exceptions, *Howell v. Howell*, 162 N. C., 283, is conclusive in favor of the action of the court below. In that case it was said that at common law it was true that "abduction of a child was not an offense." *S. v. Rice*, 76 N. C., 194; but 3 Bl. Com., 140, holds that a civil action lay therefor and that a father could recover damages, though he says it "was a doubtful question, on which the authorities were divided, whether a father could recover for the abduction of any other child than the oldest son and heir." But, after citing numerous authorities, the Court, in *Howell v. Howell*, says that the action can now be sustained, and the jury has a right to award damages for mental anguish as a part of the compensatory damages for such wrong, adding: "The most usual case in which this action is brought has been upon the abduction of a daughter for marriage or immoral purposes, but the modern authorities, as we have said, have advanced and now the parent can recover damages for the unlawful taking away or concealment of a minor child, and it is not limited to cases in which such child is heir or eldest son nor to cases where the abduction is for immoral purposes, nor are the damages limited to the action for loss of services"; adding: "The real ground of action is compensation for the expense and injury, and punitive damages for the wrong done him in his affections and the destruction of his household, as said in *Scarlett v. Norwood,* 115 N. C., 285; *Abbott v. Hancock,* 123 N. C., 99; *Snider v. Newell,* 132 N. C., 614, 623, 624."

The law is thus summed up, with citations of numerous authorities, in 1 A. & E. (2 Ed.), 167, as follows: "A father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or harboring the child after he has left the house." In *Howell v. Howell* it is further said: "It can make no difference that the child at the time she was carried away was not in the immediate custody of the father. She was temporarily with her mother but he was legally entitled to her custody or to have it adjudged by the court, and to take her out of the jurisdiction of the court, or secrete her, was an injury for which he was entitled to damages. The allegation in the complaint that the defendant Briggs 'procured, aided, assisted and advised the taking off of the child and conceal its whereabouts, and has thereby caused the plaintiff great and agonizing distress of both mind and body,' states a good cause of action against him." In *Howell v. Solomon,* 167 N. C., 591, *Walker, J.,* quoting *Howell v. Howell, supra,* as to the right of the father to the custody of the child, says: "This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, when the empire of the father gives place to the empire of reason."

The defendants rely upon *Wilkinson v. Dellinger,* 126 N. C., 462, which was a suit against a register of deeds for issuing a license to marry a minor which has no application to the facts in this case. He did not deprive the father, forcibly and violently and against his will, of the custody and society of his daughter as the defendants did, but even in that case it is said, "From a time whereof memory runs not, a parent and those in *loco parentis* have a right to the company and services of a child during its infancy, and any one unlawfully invading that right is liable to the plaintiff in damages."

In that case the court held that the register of deeds was liable for the penalty prescribed by the statute, but not for depriving the plaintiff of the services and companionship of his daughter, which clearly the register did not do. The girl was of a lawful age to marry, and upon the marriage her control by the father ceased by operation of law. It clearly has no application to this case.

The court also properly refused to charge that the plaintiff's evidence did not warrant more than nominal damages. In *Howell v. Howell, supra,* it was held that the jury had a right to award compensatory damages for the wrong and for the mental anguish, and might also award punitive damages, which fitted the last exception in this case.

Howell v. Howell, supra, is reported in 31 A. & E. Anno. Cas., 893, with copious notes, 896-899, which are thus summed up: "The right of a father to the custody of his minor children, in the absence of any act on his part by which he may have waived or deprived himself of that right, is not open to discussion, and has frequently been asserted in *habeas corpus* proceedings instituted by him." It is further said that the "right of the father to recover damages for the abduction of a minor child has been questioned in comparatively few cases and is well established," citing a long list of cases. It is also recited, "The basis of the father's right of action for the abduction or enticing away of his minor child is generally held to be the loss of the child's services," giving a long list of cases. "In some jurisdictions it has been ruled that it matters not whether a child renders services in fact. That the parent is entitled to such services on the part of the child is sufficient to give him a right of action, and having such right on which to base the action, he may recover damages for the injury to his feelings, and the loss and companionship of his child as well as for the loss of the child's services." In two jurisdictions, however, the Court repudiates the idea that the loss of the child's services forms a basis of the father's right of action. In *Kirkpatrick v. Lockhart,* 2 Brev. (S. C., 276), it says: "The true ground of action cannot be the loss of service, for a child may be of an age so tender or of a constitution so delicate as to be incapable of rendering any service. The true ground of action is the outrage and oppression; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heartrending agony he must suffer in the destruction of his dearest hopes, and the irreparable loss of that comfort and society which may be the only solace of his declining age."

It is very true that in many instances, owing to the tender years of the child or its delicate health, or the pecuniary condition of the parents, the loss of services are inappreciable, but in all cases there is the wrong and outrage of taking from the custody of the parent whose feelings of affection, whose right to the love and companionship of the child are violated as in this case. There are, however, a very large number of instances in which the loss of the services of the child are a serious consideration. A very large part of the population of this or any other State are people who either are laborers or in moderate circumstances. They look to the aid of the older children in services about the house, or their wages until they attain majority, to add to the family resources and to aid in the support of the younger children. This with a very large element of the population is a very serious consideration, and if other parties can, by enticement, persuasion or offer of wages induce the children, after they arrive at an age where their services are useful to the family or can procure wages, with impunity to leave and deprive the parents of their services, it will be a very serious loss to them, besides the insult and the injury of enticing them from the custody of their parents. This consideration is lacking where the parents are in affluent circumstances, but the outrage and injury to the parents will subject the offending parties to liability both for compensatory and punitive damages.

The law protects the parents in the right to the custody, the control and the services of their children until they reach the legal age. When a marriage has legally taken place the control of the father or mother ceases, and with it the right to the wages of the child; but, none the less, if the marriage has been procured against the will of the parents, it may well be that the parents would be entitled to compensation for the loss of services in cases where the services or wages of the child would have been relied upon by the parents.

That question, however, is not now before us. In this case the defendants, in a most lawless way, went to the house of the plaintiff by a back way, took his daughter from the custody of a weeping mother and carried her to another State. If this had been followed by moral misconduct it would have increased the damages; but none the less, though it was followed by marriage, the father has been deprived of the services of his daughter, his right to expect her love and affection, and is entitled to the protection of the court against such lawlessness, which, notwithstanding the subsequent marriage, can be asserted as to these defendants by compensation for the mental anguish inflicted on him and punitive damages for the violation of his rights and the indignity to his feelings shown in the high-handed and lawless conduct of the defendants.

It is not unusual among working people and those in moderate circumstances to rely to a large extent upon the services and wages of the older children, and often, in granting their consent to the marriage of a minor, if a daughter, it is upon an agreement that the husband shall work with the parents on some agreed terms. This is by no means unusual, and as a classical instance it will be remembered that Jacob thus served for seven years in advance for Rachel, and that when the morning dawned on Leah, he served yet another seven years notwithstanding the fraud of Laban.

That the damages are not limited to an action for the loss of services was held by us in *Hood v. Sudderth,* 111 N. C., 215; *Willeford v. Bailey,* 132 N. C., 402; and especially is this so when by reason of the age of the daughter there is no longer any legal right on the part of the parent to exact her services. Still in these cases there are elements of damages, the real ground of action in such cases being compensation for the expense and injury and punitive damages for the wrong done him in his affections and the destruction of his household, as stated in *Scarlett v. Norwood* and other cases, *supra.* There are many other States now which hold that "A parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expense of sickness."

Even on an indictment for abduction it is not necessary that it should be against the will of the minor child. It is sufficient if it is against the will of the father and that it is committed by violence, fraud, or persuasion. *S. v. Burnett,* 142 N. C., 581; *S. v. Chisenhall,* 106 N. C., 676; *S. v. George,* 93 N. C., 567. The defendants could not be indicted, however, for our statute for abduction applies only when the child is under fourteen years of age. C. S., 4222, 4223, 4224.

It is also true that merely marrying a woman who is a minor, if over the age of fourteen, without the consent or her parent or guardian, is not a crime in this State though it has been made so in Georgia and several other States. 1 A. & E. (2d Ed.), 173. Nor can the father recover for loss of services against the husband after marriage as a general rule. "A parent, or one standing in *loco parentis* of a child, is entitled to recover loss of damages sustained by reason of the taking of such child from him by force, fraud, or persuasion, and the parent's consent is no defense if it has been obtained by fraud." 1 C. J., 301. But it is there added: "As a general rule, where the abduction has been for the purpose of marriage, if a legal one, there can be no recovery for loss of services after the marriage has taken place."

This action, however, is not against the husband nor for loss of services after marriage. His Honor correctly told the jury that they could "Award the plaintiff such damages as is a reasonable compensation for the loss of the services of his daughter between the time of her abduction and the time of her marriage, and also such damages as are a reasonable compensation for the mental anguish suffered by plaintiff by reason of the abduction of his daughter, if the jury find that he suffered mental anguish as a result thereof." This was a correct exposition of the law against these wrong-doers, and there is no exception that the jury exceeded this instruction, which is assigned for error. The small amount of damages ($275) assessed seems to indicate that they fully understood and kept well within the limits of the instruction.

No error.

HOKE, J., concurs in result.

ALLEN, J., dissenting: I agree to the general principles stated in the pinion of the Court, but do not think they have any application to the acts in this case.

The daughter of the plaintiff was sixteen years of age; she left her ome voluntarily according to the evidence of her mother, a witness for he plaintiff, and she was married within twelve hours. The marriage vas therefore valid, although the father did not consent, and upon its onsummation the rights and duties of the parent, including the right o service, were transferred to the husband.

The statute (C. S., 2494) provides that "All unmarried male persons f sixteen years or upwards of age, and all unmarried females of ourteen years or upwards of age, may lawfully marry" (the exception s omitted because not applicable); and if the daughter, being sixteen, ould lawfully marry, she could lawfully consent to marry, and this he did when she left home voluntarily for the purpose of marrying, nd she was not therefore induced to leave the parent wrongfully or nlawfully, on which this action must rest.

I think the case of *Wilkinson v. Dellinger,* 126 N. C., 462, is directly n point. The action was against the Register of Deeds of Catawba ounty. Two causes of action were alleged in the complaint, the first eing to recover the penalty of $200 for unlawfully issuing the license or the marriage of a daughter under eighteen years of age without the onsent of her father, and the second cause of action "for deprivation f the services and society of his daughter occasioned the plaintiff by he wrongful issue of the license." The defendant demurred to the omplaint, and the demurrer was overruled as to the first cause of ction and sustained as to the second cause of action.

The demurrer of course admitted the allegations in the complaint, hat the defendant had wrongfully issued the license and had deprived the plaintiff of the services and society of his daughter.

The Court has this to say of the second cause of action: "A female may lawfully marry at the age of fourteen years. Code, sec. 1809. From a time where memory runs not, the parent and those in *loco parentis* have a right to the company and services of the child during its infancy, and any one unlawfully invading that right is liable to the parent in damages. During the same period of time the law requires the parent to feed, clothe and protect the infant. This right and these duties go together, and as a general rule when one legally terminates the other ceases. . . . It is equally well settled that a husband, who has married an infant at a time when she may lawfully marry, *i. e.,* after fourteen years of age, is entitled to the company, comfort and services of his wife, and that any interference therewith subjects the offender to punishment in damages. . . . The law of marriage, on the grounds of public policy and the peculiar relationship established by marriage, overrides the right of the parent to the services of the child, and the duties of care and protection are imposed on the husband, and at the same moment those duties as to the parent cease. So the marriage displaces parental rights instead of creating a conflict. The marriage in a case like this emancipates the wife from her former parental duties, and if damage has come to the plaintiff it is *damnum absque injuria.* Cooley on Torts (2d Ed.), 278; *Comrs. v. Graham,* Mass., 578; *Hervey v. Moseley,* 7 Gray, 479; *Grant v. Grant,* 109 N. C., 710; *S. v. Parker,* 106 N. C., 711.

"It follows, therefore, that the plaintiff, having no right to control nor any interest in the services of his daughter, cannot recover damages from any one." See, also, 20 R. C. L., 617; *Harvey v. Moseley,* 66 Am. Dec., 515.

I do not think the case of *Howell v. Howell,* 162 N. C., 283, which is said to be conclusive in the opinion of the Court, has anything to do with the question presented here, because in that case the child abducted was only six years of age, and there was no question of marriage.

J. H. EMERY ET AL. v. COMMISSIONERS OF MECKLENBURG COUNTY.

(Filed 3 June, 1921.)

1. **Constitutional Law—Counties—Streams—Bridges—Statutes—Bonds—State Lines—Apportionment of Expenses—Necessary Expenses.**

Our statutes are constitutional and valid, authorizing the county commissioners of any county bordering on another State to pay the proportion of the cost of building any bridge spanning a river where it is the State line, including cost of approaches, and to issue bonds to raise money to pay the same; and the objection that the building of the bridge is not a necessary county expense, and may require the county to pay more than it should for that part of the bridge and approaches that lie within the county, is untenable. Const., Art. VII, sec. 7. *Martin Co. v. Trust Co.,* 178 N. C., 26, cited and applied.

2. **Same—Population.**

Where a county is authorized by statute to unite in building a bridge over a stream on the State line with another county lying across the stream, in another State, the proportionate cost should be adjusted with a view to the proportionate benefits received by it, which is *prima facie* in proportion to population, unless the statute authorizes an agreement upon a different basis.

3. Statutes— Counties— Bridges— Streams—State Lines—Necessary Expense—Apportionment of Expense—Courts.

What proportionate part of expense a county should bear in the building of a bridge and its approaches over a stream on the State line, or whether such expenditures were necessary, are matters exclusively for the Legislature, and not for the courts to determine.

4. Constitutional Law—Statutes—State Lines—Streams—Bridges—Delegated Powers—Counties.

The authority that a Legislature of this State has to unite with an adjoining State in constructing and maintaining a bridge over a stream on a State line, may be delegated by a general statute to the commissioners of any county lying on the stream, to take proper action, bear the cost, and adjust its contribution with the authorities of the county lying on the other side of the stream. Const., Art. III, sec. 29.

APPEAL by plaintiffs from *Lane, J.*, at May Term, 1921, of MECKLENBURG.

This action is by the plaintiff on behalf of himself and other taxpayers of Mecklenburg County to restrain the defendants, the county commissioners, from advertising, selling and issuing bonds of that county in the sum of $80,000 for the purpose of coöperating with York County, S. C., in building a bridge and approaches thereto over the Catawba River, which is the dividing line between North Carolina and South Carolina.

The defendant commissioners of Mecklenburg are authorized to issue these bonds by chapter 103, Laws 1919, and chapter 11, Special Session 1919. By the terms of these acts county commissioners of any county are authorized to pay such proportion of the cost of building any bridge spanning a river where it is the State line, including cost of the approaches thereto, and issue bonds to raise the money to pay for the same. These statutes provide that this shall be deemed a necessary expense where a public road or highway has been laid off and there is no passable ford at that point, and the county can contribute to the cost of said bridge and approaches in proportion of its population to that of the county on the other side unless otherwise agreed. The cost is estimated at $120,000, of which Mecklenburg is to furnish $80,000 and York County $40,000, which is according to said proportion.

The defendants demur upon the ground that they are authorized by the aforesaid statutes, which are referred to in the resolutions, to issue and sell the bonds, which resolutions of the board are attached to the complaint, and that their action is valid and constitutional. The court sustained the demurrer, and the plaintiffs appealed.

Clarkson, Taliaferro and Clarkson for plaintiffs.
Cansler & Cansler for defendants.

CLARK, C. J. The only question raised by the pleadings and judgment and the plaintiffs' exception and assignment of error is the constitutionality of the statutes authorizing the issue of the bonds. The plaintiffs contend that said acts are in contravention of Art. VII, sec. 7, of the Constitution of this State, in that the Legislature thereby authorizes the issuance of the bonds of the county for other than a necessary expense without a vote of the qualified voters. They base this contention upon the ground that the building of a bridge and the approaches thereto over a river forming the State line, and the payment possibly for more than that part of the bridge and approaches as lie within the county, is not a necessary expense of said county. While this exact question has not been before the Court it is decided in principle in *Martin County v. Trust Co.,* 178 N. C., 26. In that case we held constitutional a statute authorizing the issuance of bonds by two adjoining counties to build a bridge and approaches over a stream dividing the counties and through five miles of swamp on the Bertie side, the river lying also wholly in Bertie, while on the Martin County side there was only the approaches of probably one-fourth of a mile. The Court held constitutional that act though $150,000 was to be procured on bonds issued by Martin County and only $50,000 by Bertie. The Court in that case fully considered the subject and laid down three propositions:

1. The Legislature may authorize adjoining counties to issue bonds in certain proportions for the building of a bridge across a dividing stream, and the validity of the bonds, being for a necessary county expense, does not require the issuance to be approved by a vote of the people.

2. The proportion which a county may contribute to the building of a bridge and the approaches thereto, over a stream between it and an adjoining county, is a question for the Legislature to determine, and is not reviewable by the courts.

3. The construction and maintenance of roads and bridges is a necessary expense which the Legislature may cast upon the State at large or upon the territory specially and immediately benefited, though the work may not be wholly within the territory or the actual structure not in exact proportion to the contribution of each county, as the benefit to be derived by each must be considered.

That case settled that the proportionate part of the expense which should be borne by each of the counties was a legislative and not a judicial question, and that the approaches to the bridge were a necessary and therefore an integral part of the cost of constructing the same.

The principle involved and decided in *Martin Co. v. Trust Co., supra,* we think applies to this case. We see no ground to differentiate between the two cases because in this instance the dividing stream is a State line. The bridge being a necessary expense, the proportionate cost should be adjusted with a view to the proportionate benefit received by the county of Mecklenburg, which is *prima facie* in proportion to population, unless (as authorized by the statute) the county commissioners agree with the authorities of the other county upon a different basis.

The Legislature of this State could agree with the Legislature of an adjoining State to unite in constructing and maintaining a bridge over a stream where it is a State line. Such public bridge can be built only by joint authority of the two States, and instead of creating a special commission, the General Assembly has seen fit by a general statute (under Cons., Art. II, sec. 29) to authorize the commissioners of any county lying on such stream to take proper action, the cost to be borne by the county whose public roads will cross the stream, and to adjust its contribution with the authorities of the other county, whether it lies in this State or in another State.

The judgment overruling the demurrer is
Affirmed.

P. D. MORROW v. THE FLORENCE MILLS.

(Filed 3 June, 1921.)

1. **Nuisance—Limitation of Actions—Evidence—Measure of Damages.**

   Where there is evidence tending to show that the defendant for the past fifteen years has thrown or emptied into a branch running by the plaintiff's, raw sewage, slops, garbage, and thus has maintained a nuisance to his damage, it is not error for the trial judge to permit the plaintiff to show the existence of these conditions more than three years next before the commencement of the action, when this statute has been pleaded, when the evidence is confined solely to the question of defendant's liability. As to whether the evidence is competent upon the measure of damages is not presented or decided.

2. **Nuisance—Private Ownership—Damages—Rights of Defendant—Permanent Damages.**

   In an action for damages for the commission and maintenance of a private nuisance, the defendant is not entitled, as a matter of right, to have permanent damages assessed, without the consent of the plaintiff, when he has not sought to recover them in his action. *Webb v. Chemical Co.*, 170 N. C., 662, cited and approved.

APPEAL by defendant from *Harding, J.*, at August Term, 1920, of RUTHERFORD.

Civil action to recover damages for injuries resulting from maintaining an alleged nuisance.

The gravamen of plaintiff's cause of action is stated with conciseness in the fifth paragraph of the complaint:

"That defendant, for twenty years or more last past, has owned and operated and still owns and operates a large cotton mill, situated at the head or source of two branches or streams of water above plaintiff's said farm, and that defendant has continuously for the past fifteen years wrongfully and negligently thrown and emptied into said branches or streams of water, raw sewage, slops, garbage, refuse and offal matter, and for the past eight years has wrongfully and negligently thrown and emptied into said branches or streams of water, dyes and other refuse matter from defendant's dye vats, all of which are unhealthful and offensive, and which have been and are now carried down stream, polluting the waters of said branches or streams of water, especially along and through plaintiff's farm, generating a poisonous scum on said water and infecting the air with offensive and noxious smells and miasma, to the great injury and detriment of the plaintiff and his family."

The defendant pleaded the three-year statute of limitations and objected to any evidence tending to show the conditions existing prior to three years next immediately preceding the commencement of the suit. All evidence of this character, admitted over defendant's objection, was limited to the question of liability and expressly excluded on the issue of damages.

Defendant further contended and offered evidence tending to show that in July, 1916, it installed a sewerage system with septic tanks, etc., in conformity with the rules and regulations of the State Board of Health, and that since that time no injury has been done to the plaintiff on account of the matters and things complained of in this action.

The defendant tendered an issue as to permanent damages, in order to preclude any further litigation, but as the plaintiff stated he was not suing for such damages, his Honor declined to submit said issue, and defendant excepted.

The jury returned the following verdict:

"1. Is the plaintiff the owner of the land described in the complaint? Answer: 'Yes.'

"2. Does the defendant commit and maintain a public nuisance as alleged? Answer: 'No.'

"3. Does the defendant commit and maintain a private nuisance as alleged? Answer: 'Yes.'

"4. What damage, if any, is the plaintiff entitled to recover by reason of the nuisance committed and maintained by the defendant, as alleged, within three years from the commencement of this action and up to the trial of this cause? Answer: '$900.' "

Judgment on the verdict in favor of the plaintiff, and defendant appealed.

Morrow & Carson for plaintiff.
Quinn, Hamrick & Harris for defendant.

STACY, J. There are only two material questions presented for decision:

1. Was it error to admit evidence of the alleged nuisance for a longer period than three years next immediately preceding the commencement of the action, in view of the plea of the statute of limitations? His Honor permitted the jury to consider evidence of this character solely on the question of liability and not upon the issue of damages. Under this limitation, and considering the single purpose for which it was admitted, we think the evidence was competent and admissible. 29 Cyc., 1265; *Lentz v. Carnegie Bros. & Co.,* 145 Pa. St., 612.

We are not now called upon to say what result would have followed had it not been thus restricted. The authorities elsewhere are conflicting as to whether such evidence may be considered by the jury on the issue of damages. *Pickens v. Coal River Boom and T. Co.,* 24 L. R. A. (N. S.), 354, and cases cited. Evidently the character of the alleged nuisance would have a material bearing on this latter question. But, in the light of the record, we approve his Honor's ruling in the instant case.

2. Was the defendant, without the consent of the plaintiff, entitled to have the issue of permanent damages submitted to and answered by the jury? This question is dealt with fully in *Webb v. Chemical Co.,* 170 N. C., 662; and, upon authority of that case, we must affirm the action of the Superior Court. As said by *Mr. Justice Hoke* in delivering the opinion: "In cases strictly of private ownership the weight of authority seems to be that separate actions must be brought for the continuing or recurrent wrong, and plaintiff can only recover damages to the time of action commenced. In this State, however, to the time of trial," citing *Ridley v. R. R.,* 118 N. C., 996; *Adams v. R. R.,* 110 N. C., 325, and other cases. See, also, *Brown v. Chemical Co.,* 165 N. C., 421.

From a perusal of the entire record, as bearing upon the defendant's exceptions and assignments of error, we have discovered no sufficient reason for disturbing the results of the trial.

No error.

THELMA HUFFMAN, ADMINISTRATRIX, v. F. B. INGOLD.

(Filed 3 June, 1921.)

1. **Employer and Employee—Master and Servant—Automobiles—Negligence—Contributory Negligence—Evidence—Trials.**

   Where there is sufficient evidence of the negligence of the driver of an automobile, which proximately caused the death of an employee while taking him to work, by turning the machine from the road over an embankment, the mere fact that the deceased was sitting on the edge of the machine with his feet on the running board, after having been requested by the driver not to do so, is insufficient alone to take the case to the jury upon the issue of contributory negligence.

2. **Appeal and Error—New Trial—Issues.**

   In this case the Supreme Court refused, in its discretion, to confine the new trial to the only issue in which error was found.

STACY, J., concurring in result; WALKER and ALLEN, JJ., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at February Term, 1921, of CATAWBA.

The plaintiff's intestate was killed 30 September, 1919, by the overturning of a one-ton motor truck near Icard, which was owned and operated by the defendant in connection with his hardware business. It was driven by an employee, Titus Hefner. In September, 1919, the defendant contracted to install certain heating pipes at Valdese, fourteen miles from Hickory, and Herbert Miller and deceased were directed to take the materials and tools up there to do the work. On 30 September they started on the truck with the material and tools, Titus Hefner driving. The truck was five feet wide and had one seat, hardly so wide, back of which was the bed of the truck with the pipes and tools. Hefner, the driver, occupied the seat on the left, Miller sat beside him, and Huffman sat on the floor of the car at Miller's feet on the right-hand side, his feet being on the running board. About eight miles on the Hickory-Morganton highway and just west of Icard they crossed a concrete bridge onto a low straight fill when Hefner, the driver, suddenly turned his steering wheel to the right, then to the left, then to the right again and drove the truck out of the road on the right-hand side. The right wheels went over the right bank of the fill, ran this way for 20 or 30 feet, when the truck turned over and Huffman was caught under it and crushed to death. This action is by the widow as his administratrix to recover damages for the negligent injuries to and death of her husband. Contributory negligence was pleaded, and the court submitted the usual three issues of negligence, contributory negligence, and damages. The jury found the first two in the affirmative and did not answer the third. Judgment. Appeal by plaintiff.

W. B. Councill and E. B. Cline for plaintiff.
W. A. Self and A. A. Whitener for defendant.

CLARK, C. J. It is alleged in the complaint, and there is evidence to prove the allegation, that the defendant was a tinner and metal worker and has for years operated a hardware store in Hickory in connection with which he does the work of roofing houses, guttering, cornices, etc., and that from time to time he sends out workers from his store and shop, not only in that town but in other places where he has the doing of tin and metal work in connection with contracts for the construction, equipment or repair of buildings, public and private; and that for the purpose of transporting his employees, tools and materials from place to place the defendant has for some time past maintained and operated a motor truck and regularly employed a driver therefor; that on 30 September, 1919, the defendant ordered two of his employees, Herbert Miller and Noah D. M. Huffman, the deceased, to Valdese to do certain tin and metal work which he had contracted to do there, and undertook to convey them from Hickory to Valdese in this automobile driven and controlled by Titus Hefner, the defendant's driver; that on said journey said Titus Hefner operated the truck negligently, heedlessly and recklessly so that it overturned and caught beneath it said Noah D. M. Huffman, who was so crushed, bruised and injured by the great weight of the truck falling on him that in a few moments thereafter he died; that the death of plaintiff's intestate was proximately caused by and was due to the negligence and wrongful conduct of the defendant's servant driver, the said Hefner, in his failure to exercise ordinary and reasonable care for the safety of plaintiff's intestate while transporting him under defendant's orders and on defendant's business, and by the careless, heedless, and negligent manner in which the truck was driven in violation of the duty which the defendant owed to the deceased of safe carriage, and that said Titus Hefner was an unskilled, incompetent, unsuitable, incapable, inefficient and unsatisfactory person to operate a motor truck, and was negligent, careless and negligent in his manner of operating the same; all of which was known to the defendant prior to September, 1919, or in the exercise of reasonable care upon his part in the selection and retention of an employee for such purpose could and should have been known to him.

The answer alleges that the defendant's employees generally used their bicycles in going to and from the trips, or by rail, but says that at certain times, for the convenience of his help and to save them cost, and at their request, he would transport them to their places of work, for which he uses a truck; that Titus Hefner was an experienced and careful driver; that on the occasion mentioned the deceased and Miller, who were to do certain work at Valdese, had instructions to go by passenger train, but that they prevailed upon J. Hefner, who it appears from the evidence superintended the business of said defendant in his absence, to let the said Titus Hefner carry them over to Valdese by said truck, which was without the knowledge or consent of the defendant, and at the time said Titus Hefner was under the orders and command of said Huffman and Miller, who knew the experience and capacity of Titus Hefner as a truck driver. The defendant further avers that the overturning of the truck and the injury causing the death of deceased was not due to any negligence on the part of the defendant but accrued from some unforeseen and accidental cause when Hefner was driving the vehicle with care; and alleges that the deceased, Huffman, contributed to his injury by contributory negligence "in that the deceased was requested by Herbert Miller, in making the trip mentioned, to ride on the seat of the said motor truck, but that he negligently, carelessly, and heedless of his own safety, sat down on the floor of the body of the said truck with his feet and legs on the outside of the same, his feet resting on the running board, and that by so doing he negligently contributed to his own injury." The following issues were submitted to the jury:

1. Was plaintiff's intestate injured and killed by the negligence of the defendant as alleged in the complaint? Answer: "Yes."

2. If so, did the plaintiff's intestate, by his own negligence, contribute to his own injury, as alleged in the defendant's answer? Answer: "Yes."

Upon the verdict, judgment was entered in favor of the defendant, and the plaintiff appealed.

The first assignment of error was for the submission by the court, over plaintiff's objection, of the second issue, upon the ground that the facts as alleged in the answer did not sustain such plea. There was no evidence offered of contributory negligence beyond the allegation as set out in the complaint, and the second assignment of error is that the court refused the following prayer to instruct the jury: "If you come to the consideration of the second issue, the court instructs you that there is no evidence of contributory negligence, and it is your duty to answer this issue 'No.'"

The court instructed the jury: "There is only one view of this case in which the court submits to you the second issue which has been read and explained, 'Was plaintiff's intestate guilty of contributory negligence in the way and manner in which he sat in the truck on the trip from Hickory to Valdese?'" and the plaintiff excepted because nothing in the evidence tended to show that the sitting on the floor of the car in any wise contributed to the deceased's death. There is no evidence tending to prove that the defendant's sitting on the floor of the truck with his feet on the running board was negligence, and still less that it contributed in any way to the injury from which he died. The burden being upon the defendant to prove contributory negligence, it was error to submit the issue when there was no evidence to show negligence and that it was proximate cause.

A definition of contributory negligence is, "Some failure of duty which the deceased owed to himself under the circumstances, and that such negligence coöperating with the negligence of the defendant, found in the first issue, was the proximate cause of the injury." There was no causal connection shown that the sitting on the floor of the car by deceased with his feet on the running board affected in any way the driver's carelessly driving out of the road and off the fill. Shearman & Redfield (5th Ed.), secs. 90-93, or contributed to the overturning of the truck, which occurrence the defendant contended was accidental or due to some unknown cause.

The court erred in refusing, upon the testimony, to charge that there was "no evidence of contributory negligence, and that it was the duty of the jury to answer that issue 'No.'" There was no controversy as to the position of the three occupants of the truck other than that the deceased sat on the edge of the truck with his feet on the running board. The defendant offered no testimony that the deceased being there in any way caused the overturning of the truck, which occurred because the driver, as they crossed a concrete bridge onto a low straight fill, suddenly turned his steering wheel to the right, then to the left, then to the right again and drove the truck out of the road on the right-hand side, the right wheels going over the right bank of the fill, and after running this way for 20 or 30 feet the truck turned over and Huffman was caught under it and crushed to death.

There was allegation and much evidence offered by the defendant tending to show that the deceased was killed by an accident and without any negligence on the part of the driver of the truck; also that the deceased and Miller were in charge of the truck and the driver was under their orders; also the defense was set up that the deceased assumed the risk. That the deceased and Hefner were fellow servants was not pleaded; and, on the contrary, both the complaint and the answer alleged that they were not. But all these defenses were matters arising upon the first issue, "Was plaintiff's intestate injured and killed by the negligence of the defendant as alleged in the complaint, as to which the jury responded 'Yes.'" The defendant made no exception as to that issue and has not appealed, and we must take it that said issue was properly submitted without error in the charge of the court or in the admission of evidence.

We think there was error in the particulars above pointed out, in the submission of the issue as to contributory negligence, as to which the burden of proof was upon the defendant and as to which neither the allegations in the answer nor the proof, which did not go beyond said allegations, justified the submission of said issue to the jury.

On appeal, it is in the discretion of the court whether to restrict a new trial to the issue or issues affected by the error. *Strother v. R. R.*, 123 N. C., 199, and numerous cases there cited. Wherever the error is confined to one or more issues separable from the others, and it appears to us that no prejudice will result from such course, this Court usually grants a new trial restricted to such issues. *Lumber Co. v. Branch*, 158 N. C., 251, which the plaintiff requests us to do in this case. This the Court could do, but we are of the opinion that, as this case must go back for trial upon the issue of contributory negligence and of damages, that we should direct a new trial upon all the issues.

New trial.

STACY, J., concurs in result only.

WALKER and ALLEN, JJ., dissenting: We dissent in this case from the ruling by which it is held that there was no evidence of contributory negligence. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, sec. 1, and notes. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence, or want of care and caution on his part, the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not. *Balto. and Potomac R. R. Co. v. Jones*, 95 U. S., 439 (24 L. Ed., 506). It remains to apply these tests to the case before us.

The plaintiff was being carried to the place of his work. He had the choice of a safer place in the truck to ride, but he chose a dangerous one. If he had not done so he would not have been hurt. It was because of his position on the truck, and because of that alone, that he was injured. This cannot be doubted. No one else was injured. It is not whether he caused the truck to be thrown against the bank, he being caught between the two, but whether by reason of his own act he had exposed himself to the very danger which occurred. There was, at least, some danger or there would have been no exceptional injury in his case. It is said in *R. R. v. Jones, supra:* "The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on plaintiff's part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down," citing *Hickey v. R. R.,* 14 Allen, 429; *Todd v. R. R. Co.,* 3 Allen, 18; *S. c.,* 7 Allen, 207; *Gavett v. R. R. Co.*, 16 Gray, 501; *Lucas v. R. R. Co.,* 6 Gray, 64; *Ward v. R. R. Co.*, 11 Abb. Pr. (N. S.), 411; *R. R. Co. v. Yarwood,* 15 Ill., 468; *Doggett v. R. R. Co.,* 34 Iowa, 284.

This case is not unlike in principle, and is analogous in its facts, to *Howard v. R. R.,* 132 N. C., 709. Plaintiff, in that case, was sitting on the rear platform of a shanty car with his feet on the bottom step, where he could get a better view of the country. There was a seat for him in the car. The train passed a pile of lumber which struck his legs and injured him. It is true that he had been ordered not to stand or sit on the platform, but the rule was not enforced but habitually violated. More honored in the breach than in the observance. He was on the steps, therefore, voluntarily, and under the same circumstances as plaintiff was sitting on the side of the truck. It cannot well be said that sitting on the side of a truck with the feet on the running board is not more dangerous than sitting inside of the truck. The actual fact demonstrates that it was. We do not pass upon the weight of the evidence to show negligence on plaintiff's part, no more than we would to show negligence of the defendant. It is quite sufficient if there is any evidence of negligence. The jury answered the issue as to contributory negligence "Yes," and defendant is entitled to the judgment.

We are of the opinion that the judgment was correct and should not be disturbed.

SYLVA SUPPLY COMPANY v. W. W. WATT.

(Filed 3 June 1921.)

Compromise—Acceptance of Check, in Full—Accord and Satisfaction—Debtor and Creditor.

A creditor who accepts and cashes a check whereon is written that it is a settlement in full, being for a disputed account, may not, without having first made a valid agreement to the contrary, repudiate the conditions upon which he was to have accepted it; and this principle applies when his own account for goods sold and delivered is not disputed, but a deduction is claimed by the sender of the check for damages he claims in a different matter.

APPEAL by defendant from *Webb, J.*, at October Term, 1920, of JACKSON.

Civil action to recover an alleged balance due on a grocery account.

The plaintiff rendered the defendant a statement of his account, and in response to same, the defendant deducted $45 from the bill for damages done to his automobile by the plaintiff's truck driver and mailed plaintiff a check, stating it was "in settlement of account." The plaintiff cashed the check, and there was evidence tending to show that a letter was written to the defendant containing the information that plaintiff would not allow said deduction, as the damage to the car would not exceed eight or ten dollars, but defendant testified that this letter was never delivered. Plaintiff also stated that suit would be necessary in order to settle the alleged claim for damages. Later defendant received another and revised statement of his account, and in reply thereto he again deducted the $45, calling attention to what it was for, and mailed his check to cover the difference, stating this "balances the account between us."

Plaintiff deposited the check and credited same on defendant's account, and then brought suit for the alleged balance of $45. Defendant denied liability and contended that the account had been settled by reason of the acceptance of the checks as above detailed.

Defendant moved for judgment as of nonsuit at the close of the plaintiff's evidence and again at the close of all the evidence. Motions overruled and exceptions.

From a verdict and judgment in favor of plaintiff for $45, interest and costs, the defendant appealed.

Felix E. Alley for plaintiff.
Sutton & Stillwell for defendant.

STACY, J. It will be observed that the defendant's claim of $45 for damages to his automobile had been brought to plaintiff's attention and the parties were in sharp dispute about the matter. The amount to be allowed and the method of adjustment were both in controversy. It is true the grocery account was not denied, but it clearly appears that defendant's first check was sent "in settlement of account," and the second was enclosed in a letter containing the statement that this "balances the account between us." The item of $45 for damages to the automobile was deducted in both instances. There was no ambiguity or grounds for misunderstanding defendant's tender and offer of settlement. Obviously he wanted to adjust all of their differences at one and the same time. The plaintiff had its choice, and we think it is precluded by its acceptance and election knowingly made. The check should have been returned if the conditions of its acceptance were not satisfactory, or at least, the defendant should have been given an opportunity to say whether he would waive the conditions and allow the check to be credited on account.

"If a check is sent in full payment of a debt, and the creditor receives and collects it, he is bound by the condition annexed to its acceptance. He will not be permitted to collect the check and repudiate the condition." *Aydlett v. Brown,* 153 N. C., 334. And again, in *Rosser v. Bynum,* 168 N. C., 340, the rule is stated as follows: "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full, or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for," citing *Armstrong v. Lonon,* 149 N. C., 435; *Kerr v. Saunders,* 122 N. C., 635; *Pruden v. R. R.,* 121 N. C., 511; *Petit v. Woodlief,* 115 N. C., 125; *Koonce v. Russell,* 103 N. C., 179. See, also, *Mercer v. Lumber Co.,* 173 N. C., 49.

Plaintiff contends that the correctness of the grocery account was not in dispute and that the principles of accord and satisfaction are therefore not applicable to the facts here presented (*Bogert v. Mfg. Co.,* 172 N. C., 248), but we must view the case in all of its bearings. The parties were caviling as to whether any allowance should be made for damages to defendant's automobile in settling the store account. In other words, they were contending over the question as to whether the two claims should be considered and settled together by deducting the one from the other and paying the balance, or divorce the two and consider them separately. Upon the basis of adjusting both accounts at the same time, defendant mailed his check for the difference between the two, and this was accepted by the plaintiff. Under these circumstances—the facts being admitted and not denied—we think the defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

JOHN TATHAM & CO. v. LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

(Filed 3 June, 1921.)

Insurance, Fire—Policy—Stipulations—Actions—Period of Limitation by Contract—Waiver.

Under the valid provision of a standard fire insurance policy, approved by statute, the period limited to twelve months from the time of loss by fire in which an action may be maintained is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured.

APPEAL by plaintiffs from *Long, J.*, at January Term, 1921, of HAYWOOD.

Civil action to recover upon two contracts of insurance. They were written by the defendant to cover a certain lot of lumber belonging to the plaintiffs and which was destroyed by fire while said contracts were in force.

The policies were issued on 18 January, 1918, and 12 April, 1918, respectively, and they contain the regular standard provisions and stipulations as authorized and set out in chapter 109, Public Laws 1915. The loss occurred 1 June, 1918, and this suit was instituted 25 October, 1919. From a judgment of nonsuit, the plaintiffs appealed.

Felix E. Alley and Merrimon, Adams & Johnston for plaintiffs.
Tillett & Guthrie for defendant.

STACY, J. The two policies in suit were issued under authority of chapter 109, Public Laws 1915. Each contained, among other provisions, the following stipulation which was expressly prescribed and sanctioned by the statute law of the State then in force:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the insured shall have complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire."

The loss occurred on 1 June, 1918, and suit was commenced 25 October, 1919, nearly seventeen months thereafter. This was not in keeping with the terms of the policies as above set out. These contractual limitations and other substantially similar provisions have been upheld in a number of decisions. *Holly v. Assur. Co.*, 170 N. C., 4; *Muse v. Assur. Co.*, 108 N. C., 240; *Lowe v. Accident Assn.*, 115 N. C., 18; *Hovey v. Fidelity and Casualty Co.*, 200 Fed., 925; *Modlin v. Ins. Co.*, 151 N. C., 35; *Gerringer v. Ins. Co.*, 133 N. C., 414; *Parker v. Ins. Co.*, 143 N. C., 339; *Faulk v. Fraternal Mystic Circle*, 171 N. C., 302.

In explanation of the delay in commencing suit within the time fixed by the policies, plaintiffs contend that they were induced to defer action on account of the defendant's conduct in agreeing to an appraisal and award of damages, etc., but we are unable to find in the record any waiver or action not contemplated by the terms of the contracts of insurance. *Hayes v. Ins. Co.,* 132 N. C., 702.

As now presented, and upon the record, we think the judgment of nonsuit should be sustained.

Affirmed.

R. G. PARKER, ADMINISTRATOR, ET AL. v. MILDRED E. MOTT ET AL.

(Filed 3 June, 1921.)

1. **Gifts—Inter Vivos—Causa Mortis—Possession—Delivery.**

In order to a valid gift of personal property *inter vivos* there must be an actual or constructive delivery with the present intent to pass the title, applying also to gifts *causa mortis*, with the principal distinction that the latter are made in contemplation of death from a present illness or peril, and is revocable during the life of the donor and revoked by his recovery or escape or by his surviving the donee.

2. **Same—Donative Intent.**

Where a chose in action is represented by a bond or other written obligation, a valid gift may be made by delivery of the instrument without indorsement with the intent to presently pass the title, and when the donee is the debtor there may be a gift of the chose in action by a destruction of the instrument with the intent to give, or a written receipt of whole or a part of the debt.

3. **Same—Postponement of Enjoyment.**

Where a gift is otherwise complete, it will not be rendered ineffective merely because the enjoyment is postponed to a future date or until the death of the donor.

4. **Same—Conditions.**

Where the subject of a gift is not reasonably capable of actual delivery, such is not always required; and where the payee of a note indorses the principal sum to the maker, with the present intent of a gift, but reserves the right to the interest during her life, and retains the possession of the note, this possession so retained is evidently for the purpose of enabling her to collect the interest during her life, passing to the donee all control and ownership of the principal sum, and does not affect the validity of the gift, which becomes effective at the death of the donor when the conditions have been performed. *Semble*, a written assignment is necessary to a valid gift when the subject-matter is a mere chose in action, and not evidenced by written instrument.

5. Gifts—Acceptance—Presumptions.

Where a donor, in the presence of the donee, makes a gift to the principal of his note to him, and retains the right to the interest during her life, the latter's acceptance is presumed, nothing else appearing.

APPEAL by plaintiff from *Finley, J.*, at the November Term, 1920, of FORSYTH.

The action is to recover the amount of two promissory notes, under seal, of one thousand dollars ($1,000) each, of date 17 May, 1912, payable to Rebecca Ellis, plaintiff's intestate, due two years after date, signed by defendants T. A. Mott and Mildred E. Mott, his wife, same being secured by a mortgage on real estate of the obligors situated in the town of Hickory, N. C., duly registered in Catawba County. Defendants, the obligors, and Annie E. Simpson resisted recovery, claiming that the amount due on the notes had been given by the payee in her lifetime to defendants Mildred E. Mott and Annie E. Simpson, her nieces, and there was nothing due thereon to the estate. Plaintiffs put the notes in evidence with proof that the same were found among the valuable papers of the deceased on her death at her home in Winston, N. C., where plaintiff had qualified as her administrator. Defendants offered evidence tending to show that some time before her death Rebecca Ellis, the payee, was on a visit to the home of Mr. and Mrs. Mott at Hickory, N. C., and expressed her desire and intention to give these two notes and the amounts they represented to her nieces, Mildred E. Mott and Annie Simpson, and with that view sent for a lawyer, Mr. M. H. Yount, who came to her home and undertook to draw papers so as to carry out the purpose and intent of the payee, Mr. and Mrs. Mott being also present. The testimony of the attorney as to the occurrence is as follows:

"In 1912 and 1915 I was living at Hickory, N. C., practicing law. I wrote the indorsement on the back of the notes which have been introduced in evidence and marked 'Plaintiff's Exhibits 1 and 2,' and Miss R. S. Ellis signed them.

"Q. At whose request did you make those assignments on the notes? A. At the request of Miss Ellis.

"Q. Where were you when these assignments were made? A. I was in the home of Capt. T. A. Mott in Hickory.

"Q. What did Miss Ellis say to you when you went down there to the house? A. Miss Ellis told me, after I went into the room where she was sitting, that she wanted to give $1,000 to each of her nieces. I think she said they were nieces. Mrs. T. A. Mott and Mrs. R. E. Simpson. She then produced two notes which she had, and she said, 'I want to give them at this time, each one of them, this amount as evidenced by these notes, and I want you to make such indorsements on the notes as will show it. She says, 'The only thing I want on the notes is the interest; I want Mr. Mott to pay me the interest on the amount during my lifetime.'

"Q. What did you say to her there about it at the time? A. I told her why not make a will of her entire property if she was going to distribute it at that time, and she replied, 'I don't want to make a will, but I do want to give this to my nieces at this time, and my other property I wish to be distributed as the law will distribute it at my death. I don't want any litigation or trouble over my estate, and if I make a will there might be such trouble.'

"Q. Did she say anything further about when this gift was to take effect? A. She said that she wanted to give this amount at that time, that she wanted Captain Mott to pay her the interest on the principal during her lifetime; that she did not need the principal but she could live on the interest of her investments.

"Q. Did she say anything about having other investments? A. Yes, she said she had other property, the interest from which was sufficient to maintain her.

"Q. Who else was in the room when she was saying this? A. T. A. Mott and his wife, Mildred Mott.

"Q. Mrs. Simpson was not there? A. No, sir.

"Q. Was there anything said as to whether or not she would retain the notes, or what would be done with them? A. She said there would be no trouble about it. I don't know just what remarks she made about the other part, but she said, 'There will be no trouble about this at my death, I am sure.'

"Q. Did she say anything about the notes in connection with the interest, anything of that sort? A. I don't recall just what she said about that. I know she said she wanted to give them the amount of these notes, and she wanted something to show the interest on this amount, this interest was to be paid to her as long as she lived.

"Q. Did you see Miss Ellis after that time? A. No, I don't think I ever saw her after that, not that I recall.

"Q. You simply went there in the capacity of attorney to make these assignments? A. Yes.

"Q. Did she say anything to you when you went in about why she sent for you? Do you recall just what she said when you went in? A. Yes, she said she wanted to make a gift of $1,000 to each of her nieces, and then she produced two notes and she said, 'I want you to make such indorsements on these notes as will show I have given one to Mrs. Mott and one to Mrs. Simpson, and I want to retain some evidence of the fact that Mr. Mott was to pay me the interest,' and the different indorsements on the notes were made because Mrs. Simpson was not there."

Cross-examination:

"T. A. Mott and his wife are not in the courtroom now. I have not seen them here this week. Neither have I seen Mr. Simpson or his wife here this week. I think Mr. Mott came to my office to get me to go and write the transfer of these notes, and I went down to Mr. Mott's house in Hickory, and there is where the transfer was made. After I made the transfer or indorsement on the back of notes, I laid the notes on a table in the room where I was making the indorsement, and I don't know whether Miss Ellis took the notes or not; I didn't have anything to do with that. I didn't see the notes any more until after the death of Miss Ellis and this controversy came up."

There was testimony also from T. A. Mott that after Miss Ellis returned home she sent the mortgage to him marked across the face "This mortgage is satisfied," 30 June, 1915; signed by R. S. Ellis, and admitted to be her signature, with the request that the mortgage be canceled and record what had been done.

The defendant Mott further testified:

"I paid the interest on the notes sued on up to the date of Miss Ellis' death. At the time she died I owed interest from May, 1917, and payment was made after her death. The interest was paid annually. The interest became due on May 5th of each year, I think, and at the time of her death I owed interest back to the previous May 5th, and I paid that. The mortgage was sent to me some time in the latter part of July, 1915, and I kept paying interest right along up to the time of her death. I paid May 5th of the year preceding her death to the date of her death. Miss Ellis died in February, 1918, I think. After her death I paid the interest to the date of her death. She died in February, and I paid the interest up to date of her death. I paid it from May 5th up to the date of her death."

The indorsement written on the back of these notes by the attorney and signed by Miss Ellis, the payee, in the presence of these parties, are respectively as follows:

"At my death this note is to be delivered to Mrs. Mildred E. Mott, as a gift to her from me, and the mortgage securing the same to be canceled, and the same is hereby assigned to her, the interest to be paid to me during my life.

This 29 June, 1915. R. S. ELLIS.

Witness: M. H. YOUNT."

"At my death this note is to be delivered to Mrs. Annie E. Simpson, as a gift to her from me, and the mortgage securing the same to remain in force until she is paid the amount of the note by the makers, and the same is hereby assigned to her under these conditions, the interest to be paid to me during my life.

This June 29, 1915. R. S. ELLIS.

"Witness: M. H. YOUNT."

The court submitted the question of a gift of these notes to the jury, ruling in effect that if the payee indorsed the notes and the written assignment appearing thereon to the defendants Mildred E. Mott and Annie E. Simpson, under the circumstances as stated by the attorney, and with the intent and purpose of passing the present ownership of the notes to these parties, that would constitute a valid gift of the notes and the principal of the same, and their verdict would be for the defendants. Verdict and judgment for defendants, and plaintiffs appealed, and admitting that the payee indorsed the notes under the assignment appearing thereon with the view of presently passing the ownership of the notes to the assignees. Assigned for error, that as a matter of law there was no such delivery of the notes as would constitute a valid gift.

E. B. Jones for plaintiffs.
Manly, Hendren & Womble for defendants.

HOKE, J., after stating the case: The authorities in this State have been very insistent upon the position that "in order to a valid gift of personal property *inter vivos* there must be an actual or constructive delivery with the present intent to pass the title." *Thomas, Exr., v. Houston et al., ante,* 91; *Askew v. Matthews,* 175 N. C., 187; *Zollicoffer v. Zollicoffer,* 168 N. C., 326; *Patterson v. Trust Co.,* 157 N. C., 13; *Gross v. Smith,* 132 N. C., 604; *Duckworth v. Orr,* 126 N. C., 674; *Wilson v. Featherston,* 122 N. C., 747; *Newman v. Bost,* 122 N. C., 524; *Medlock v. Powell,* 96 N. C., 499; *Adams v. Hayes,* 24 N. C., 361. These requisites are also essential to a valid gift *causa mortis,* the principal distinctions being that the latter is made "in contemplation of death from a present illness or some immediate peril," is revocable during the life of the donor and is revoked by his recovery or escape or by his surviving the donee. *Thomas, Exr., v. Houston, supra; Johnson v. Colley,* 101 Va., 414, reported also in 99 A. S. R., 884; *Basket v. Hassell,* 107 U. S., 602; 12 R. C. L., pp. 962-968. Where the subject-matter of an alleged gift is a chose in action, without note, bond or other written obligation, it has been very generally held that a written assignment is required in order to a valid gift. *Poff v. Poff*

(Va.), 104 S. E., pp. 719-726; *Cook v. Lum,* 55 N. J. L., 373; *Adams v. Stone Co.* (Cal.), 178 Pac., 498; 14 A. & E., p. 1022. Though in a recent case of *Dinslage v. Stratman,* 180 N. W., p. 81, the Supreme Court of Nebraska, in a learned opinion, maintains the position that a valid gift of an open account may be made by parol where the donor, with intent to make a present gift, directs the debtor to pay the debt to the donee, the Court applying to it the recognized principle that a gift so made will be upheld when a delivery with the donative intent is made in the only way of which the "chose" is susceptible. Where a chose in action is represented by a bond or other written obligation it is usually held that a valid gift may be made by delivery of the instrument without indorsement, the same being with intent to presently pass the title, and in case the alleged donee is the debtor there may be a gift of the chose in action, termed also a forgiveness of the debt, by a destruction of the instrument with the intent to give or a written receipt delivered of a whole or a part of the debt, etc: *Carpenter v. Soule,* 88 N. Y., 251; *Ebel v. Piehl,* 134 Mich., 64; *Waite v. Grubbe,* 43 Oregon, 406. And in such case, where the gift is otherwise complete, made with the intent to presently pass the note, authority is to the effect that it will not be rendered ineffective because the enjoyment is postponed till a future date or until the death of the donor. Thus, in the *Dinslage case* (Neb.), *supra,* it is said: "The mere fact that actual enjoyment of the gift by the donee is, by the declaration of the gift, postponed until the death of the donor, does not render the gift either conditional or testamentary, or in any way invalid," citing many authorities, and the opinion quotes from *Tucker v. Tucker,* 138 Iowa, 344, to the effect that "If the gift is absolute, the mere postponement of the enjoyment until the death of the donor is not material, and will not defeat it." In the case cited from New Jersey Reports *supra* of *Cook v. Lum, Chief Justice Beasley,* recognizing the great variety of circumstances calling for the application of the law of gifts, choses in action and other, states in effect the general principle in a very helpful way as follows: "But this is a maze not without its clue, for the cardinal principle as to what constituted a delivery that will legalize a gift is on all sides admitted to be, and the test is that the transfer is such that, in conjunction with the donative intent it completely strips the donor of his dominion of the thing given, whether that thing is tangible or a chose in action." Applying the principle so stated to the facts presented, we are of opinion that this is a valid gift which presently passed the title to the principal of these notes to the donees retaining the right to interest thereon till the death of the donor and retaining possession of the notes for the purpose of collecting the interest and not otherwise. There is here no question of the donative intent, and the same is admitted, and to carry out this purpose an attorney was procured, a written assignment entered on the notes in the presence of the donees, or two of them, signed by the holder. The entry being, "This note is hereby assigned, the interest to be paid me during my life and at my death the note is to be delivered." Both the writing and the testimony pertinent to the same evince and express the clear purpose of presently passing title to the principal retaining possession of the notes, as stated, for the purpose of collecting the interest till the donor's death. To emphasize this view of the matter, the mortgage securing the notes is also delivered up marked "paid," and the same is formally canceled of record, thereafter the donor no longer had any control over the principal of these notes, and this must be held a complete and perfect gift of such principal. The right by contract to sever the principal from the interest of notes or other choses in action, according to the intent and agreement of the parties, has been directly approved in this State, and is very generally recognized. *King v. Phillips,* 95 N. C., 245; 22 Cyc., p. 1572. And the force and effect of this transaction is to presently give the principal retaining the interest and the right to collect same till the donor's death. A case very similar is presented in *Green v. Langdon et al.,* 28 Michigan, 221, where the holder of a note and mortgage, desiring to give one of his children and her husband a part of the debt, indorsed thereon a gift of the said portion with the intent and purpose of forgiving or donating so much of the mortgage debt and to extinguish the same to that extent, retaining the notes: *Held* to be a perfect gift on the ground that it was all the delivery of which the subject was susceptible, consistent with the intent and purpose of the transaction. In that case *Judge Christancy,* delivering the opinion, said: "As the debt, which was the subject of the gift, when considered with reference to the fact that the donee was the debtor, and that only part of the debt was attempted to be given, did not admit of actual delivery, and as all was done that could well be done, under the circumstances, to render the gift effectual, we do not think the act and intention of the donor should be defeated merely because the subject did not admit of actual or technical delivery." And that case also holds that the transaction having taken place in the presence of one of the donees, an acceptance by the other may be presumed. In *Basket v. Hassell,* 107 U. S., 602, and also in *Harris Banking Co. v. Miller,* 190 Mo., 640, the alleged gifts were held invalid as such, but on the ground that from the facts in evidence, the donor retaining possession of the instrument was given control of the debt till his death, though in the last case the alleged donee was awarded the property by way of a valid and enforceable trust. And in a case in our own Court, *Smith, Admr., v. Downey,* 38 N. C., 268, where a deceased obligee had indosed on a $900 note that "one B. was to have $600 of the note," retaining possession, this on the record was claimed as a gift *donatio causo mortis,* and the same was disallowed for two sufficient reasons, that being an alleged gift *causa mortis,* the donor had recovered; and further, because the facts in evidence showed that the alleged donor was to have control of the note, and the debt that it represented, till her death. But in the present case, as stated, the transaction was an assignment of the principal with the present intent to pass same, retaining possession only for the right and purpose of collecting the interest. On the facts in evidence, by correct interpretation, the transaction had the effect of passing to defendants all control and ownership of the principal; no collection of same could thereafter have been made by the donor, possession being retained by her for the purpose only of collecting the interest, this being in accord with the act and intent of the parties.

We find no reason for disturbing the result of the trial, and the judgment for defendants is

Affirmed.

A. J. HIGGINS LUMBER AND EXPORT COMPANY, INC., v. ELIZABETH CITY SHIPYARD COMPANY.

(Filed 3 June, 1921.)

1. **Courts—Discretion—Argument to Jury—Opening and Conclusion—Trials.**

Where both parties to the action have introduced evidence on the trial, the right to open and conclude argument is discretionary with the trial judge, and not reviewable on appeal. Supreme Court Rules Nos. 3 and 6. 164 N. C., 562-3.

2. **Evidence—Accounts—Admissions—Appeal and Error—Trials.**

Where itemized statements of accounts are involved in the matters in controversy in an action, an exception that they were not verified according to law becomes immaterial when they are admitted to be correct by the appellant.

3. **Evidence—Nonsuit—Trials.**

Where the plaintiff's claim for lumber sold and delivered to the defendant is admitted by the latter, who sets up a counterclaim in damages, his motion for judgment as of nonsuit upon the evidence cannot be sustained.

4. **Issues—Evidence—Admissions—Statements of Account—Appeal and Error.**

Where the only question presented on the trial is whether the defendant is entitled to recover damages as a deduction from the contract price of lumber sold and delivered to him, it will not be held for error that it was submitted on one issue; and nothing else appearing, it will be presumed, on appeal, that the question was presented under correct instructions from the court, and the issue correctly answered in the verdict.

APPEAL by defendant from *Calvert, J.*, at the November Term, 1920, of PASQUOTANK.

The plaintiff brought this action against the defendant for lumber sold and delivered and for which the defendant agreed to pay a specified price. The defendant admitted the purchase of lumber and the price agreed upon, but alleged that the lumber actually received was not 90 per cent heart as purchased, as a result of which the defendant had been damaged to the extent set up in its counterclaim. The defendant, therefore, asked for the recovery of damages upon its counterclaim.

At the beginning of the action the defendant admitted having ordered from the plaintiff the quality and character of lumber described in the complaint, and having agreed to pay for the same upon delivery the price set out therein, and stated that its only contention was that the lumber delivered was not of the character contracted for, by reason of which it had been damaged as set out in its counterclaim, and asked upon this admission that it be allowed to take the burden and the opening and conclusion in the introduction of evidence and the argument of the case. The court declined, stating that the burden of proof was on the plaintiff to show that the lumber delivered was of quality contracted for.

The defendant excepted. Both plaintiff and defendant introduced evidence. The amount of the plaintiff's demand is $2,420.72, and of the defendant's counterclaim, $1,250.

The plaintiff introduced verified statements of the accounts of the sales of lumber, and the defendant excepted because not verified according to law.

The defendant made a motion for judgment of nonsuit, which was overruled, and defendant excepted. It also tendered an issue on its counterclaim and excepted to the refusal to submit it.

The jury returned the following verdict:

"1. Is defendant indebted to plaintiff, and if so, in what sum? A. '$1,936.57.' "

There was a judgment for the plaintiff on the verdict, and the defendant appealed.

Meekins & McMullan and George J. Spence for plaintiff.
Ehringhaus & Small for defendant.

ALLEN, J. 1. Both parties having introduced evidence on the trial, the determination of the right to open and conclude the argument was discretionary, and is not reviewable. See Rules 3 and 6 of Superior Court, approved by Supreme Court, 164 N. C., 562-3.

2. It was not necessary to introduce the itemized statements of accounts, but they could not have been prejudicial to the defendant, because they showed nothing except the quantity of lumber bought by the defendant, the price agreed on, and the total, all of which was admitted by the defendant.

3. This admission also made it impossible to grant the motion for judgment of nonsuit, as did also the tender in the answer of judgment in favor of the plaintiff for $1,225.

4. Ordinarily the defendant would have been entitled to a separate issue on its counterclaim, but it appears from the record that the defendant was not asking for an affirmative judgment, but was seeking to reduce the plaintiff's demand by the matters alleged in the answer, and this contention of the defendant could well be presented under the issue submitted to the jury, and we must presume this was done, under fair and proper instructions, as the charge is not sent to this Court.

Indeed, it appears the counterclaim was allowed in part, as the plaintiff's demand, which was admitted, amounts to $2,420.72, and the verdict is for $1,936.57, which cannot be reconciled except upon the theory that the difference between the two amounts, $484.15, is the damages awarded the defendant on the counterclaim.

We find no error committed on the trial.

No error.

H. T. CHANDLER ET AL. v. COUNTY BOARD OF EDUCATION.

(Filed 3 June, 1921.)

1. **Trusts — Charitable Trusts — Schools — School Districts—Counties—Board of Education.**

   It appearing from the bequests in the will that the testator's principal purpose was to improve the public schools of his county, a devise in remainder of lands "for public school purposes," to "be cared for well and properly by the school committee of said district; manage it and apply the proceeds to keep the public school forever": *Held*, sufficiently certain in its terms to be sustained as a charitable trust, with the right, under the supervision of the board of education, to change the location of any schoolhouse, if for the best interest of those in the district.

2. **Same—Statutes—Subdivision of Districts.**

   Where a bequest of the rents or income from lands is sufficiently definite to sustain a charitable trust for public school purposes of a certain district under the supervision of the board of education, the trust is not impaired by the fact that, under a later law, the district was subdivided into other districts, for then the proceeds of the land must be apportioned among the new districts comprising the old one.

3. Same—Particular Schoolhouses.

Where, during his life, a testator was actively interested in the public schools of his district, and has built, with the assistance of others, a schoolhouse therein, and dies, leaving by will the income of the remainder in certain lands for public school purposes of his district, without special reference to the schoolhouse he himself has built, an order requiring that the proceeds be applied to the maintenance of this particular schoolhouse alone is erroneous.

APPEAL by both parties from *Horton, J.,* heard on case agreed, from PERSON.

This is a controversy without action submitted under section 626 of Consolidated Statutes, for the purpose of obtaining a construction of certain sections of the last will and testament of John C. Terrell, deceased, and settling certain controversies which have arisen by reason of a devise to Cunningham School District.

John G. Terrell, late of Person County, died in April, 1897, leaving a last will and testament devising certain land to Cunningham's School District in Person County, "for public school purposes," after the expiration of his brother's life estate therein, and providing that it must "be cared for well and properly by the school committee of said district; manage it and apply the proceeds to keep the public school forever." Cunningham's School District, at the time of the execution of said will, and also at the time of the testator's death, was public school district No. 6, for white children in Person County, whose boundaries were well known to the testator. Before making his will the testator caused the center of said district to be located by survey, and, with the assistance of some of the other residents of the district, he erected at such central point a two-room school building called Terrell Academy. The testator was himself a resident of said district, and was greatly interested in said school. Some time after 1 July, 1897, Person County was redistricted according to township lines under chapter 108, Public Laws 1897, and Cunningham's School District was abolished as a public school district, and has not since been recognized as a public school district of Person County, but since the death of Thomas D. Terrell, brother of the testator, to whom a life estate in said farm was given, and whose death occurred in May, 1907, a school open free of charge to all the white children in said district has been maintained by the rents from said farm, which range from $750 to $1,200 per year, at said Terrell Academy, over which school the county board of education has exercised no control.

As public school districts are now arranged there are three districts which lap over into and together take up a part of the territory known as Cunningham's School District, in each of which districts a public school is kept by the county for a period of six months in the year, and the custom has been for such of the committeemen of these new districts as live in Cunningham's district to constitute a committee for the school at Terrell Academy, having charge both of the school and the farm. This committee appoints one of its number to manage the said farm, collect the rents, and pay the same out upon the order of the committee. These duties are now performed by G. B. Williams who, in addition to being appointed by the committee, has informal authority from the county board of education.

For some time questions pertaining to the proper application of the income from said farm have been agitated by people living in the said district, and the county board of education has determined to exercise whatever right and authority it may have with reference thereto. The plaintiffs and many others who agree with them have conceived the idea of enlarging the said school building and using the income from said farm as a nucleus for the establishment of a graded school or high school for the benefit of the white children of said district, said fund to be supplemented by such other fund as may be or may become available or as may be raised by the people of said district by taxation or otherwise. On the other hand, it is insisted by others that the county board of education should assume charge and control of said farm and divide the income therefrom among the public school districts which embrace Cunningham's School District, or, in its discretion, make such other disposition of it as may be deemed for the best interest of the said public schools.

His Honor entered judgment upon the agreed statement that the defendant has the right to take the farm referred to into its possession and manage the same through its agents, and also that the funds realized from the farm should be devoted to maintaining a public school open to all white children of the old Cunningham district at the Terrell Academy, and both plaintiffs and defendant appealed.

F. O. Carver for plaintiffs.
N. Lunsford for defendant.

ALLEN, J. The will of Dr. John C. Terrell shows that the principal purpose of the testator was to improve the public schools of his native county of Person, and this intent on his part is expressed in terms sufficiently certain to be sustained as a charitable trust. He lived in the Cunningham School District, and prior to his death had built therein a schoolhouse called Terrell Academy. In his will he gives certain bequests to relatives amounting to $20,000 or $30,000, and then devises a tract of land of three hundred and fifty acres, subject to the life estate of a brother, to the Cunningham School District, and also to each school district in the county, numbering twenty-six or twenty-eight, except the Cunningham district, in which he had already built a schoolhouse, $300, for the purpose of building a schoolhouse in each district of the county, and the residue of the estate, amounting to $50,000 or $60,000, he gave to the schools of the whole county.

No mention is made in the will of Terrell Academy, and the proceeds from the land are given for "public school purposes," to be administered by the school committee of the district.

It is thus clear that under the conditions existing at the time of the death of the testator it was the duty of the school committee to use the farm and its rents for the school district, and not to keep up and maintain any particular school or schoolhouse, with the right, under the supervision of the board of education, to change the location of any house, if deemed for the best interest of those in the district, and this duty still exists, although it is made more difficult of performance because the Cunningham district has been discontinued and different parts of its territory have been given to four other school districts.

This does not, however, destroy the trust, and as the devise was made for the benefit of the children of the Cunningham district, the proceeds of the farm must be apportioned among the districts of which the old Cunningham district is a part, in proportion to the number of children of the old district in each of the four districts.

It follows, therefore, that there is no error on the plaintiffs' appeal, and that that part of the order requiring the proceeds from the farm to be used in maintaining the Terrell Academy School must be reversed.

Plaintiffs' appeal affirmed.

Defendant's appeal reversed.

WALKER, J., dissenting.

HENRY B. SPEARS, BY HIS NEXT FRIEND, v. TALLASSEE POWER COMPANY.

(Filed 3 June, 1921.)

1. Appeal and Error—Briefs—Objections and Exceptions.

Exceptions not considered in appellant's brief are taken as abandoned on appeal.

2. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

When it appears from the record of the case on appeal that the appellant excepted to the statement by the trial judge of his contention only, after verdict, it comes too late and will not be considered.

APPEAL by defendant from *McElroy, J.,* at the August Term, 1920, of UNION.

This is an action to recover damages for personal injuries.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

J. Laurence Jones, M. P. Spears, and Stack, Parker & Craig for plaintiff.

R. L. Smith, E. A. Gouch, and Manning, Bickett & Ferguson for defendant.

ALLEN, J. There are ten assignments of error, but all of them are abandoned because not considered in the brief of appellant (*Allen v. Reidsville,* 178 N. C., 513) except one, which is to a statement of a contention of the parties, and this exception is disposed of by the record, which says, "No objection was made or exception taken at the time the judge was charging the jury," and not until the case on appeal was settled.

An objection to a statement of a contention must be made at the time, and comes too late after verdict. *Price v. Edwards,* 178 N. C., 503; *Hall v. Giessell,* 179 N. C., 657.

No error.

JAMES W. DICKS ET AL. v. JOHN YOUNG ET AL.

(Filed 11 May, 1921.)

1. Wills—Interpretation—Intent—Changed Condition of Estate.

The primary rule of interpretation is to ascertain from the language of the will, construed as a whole, the intention of the testator in disposing of his estate, and this intent controls without any supposition as to what he would have done with his property under changed conditions.

2. Wills—Interpretation—Intent—Ambiguity.

Where, in expressing his intent, the testator uses in his will words that are free from ambiguity and doubt, no other meaning may be given than that plainly, clearly, and distinctly expressed by them.

3. Same—Survivorship—Children—Grandchildren—Estates— Contingent Limitations.

A devise of lands to the testator's wife for life, and at her death to be equally divided among his four named children, "but if either of them shall die without leaving a child or children living at their death, then the portion of such child so dying shall go to the survivors of them and their heirs forever": *Held*, the words "survivors of them" refer to the survivor of the testator's own children, to the exclusion of grandchildren whose parents, named in the will, have previously died. *Ham v. Ham*, 168 N. C., 486, and other like cases cited and applied.

APPEAL by defendants, heard on case agreed by *Ray, J.*, 30 November, 1920, from STOKES.

This is a proceeding for partition of land tried on the following agreed facts:

1. That Williams H. Flynt, late of the county of Stokes, in the State of North Carolina, died on or about the .... day of ...., 187...., leaving a last will and testament, which was duly admitted to probate in the county of Stokes on 27 January, 1877, and recorded in Will Book No. 6, p. 82, item 3 of which is as follows:

"I give, bequeath and devise unto my beloved wife, Minerva Flynt, all my real estate, consisting of the two above mentioned tracts of five hundred and fifty acres, more or less, and five hundred and thirty-two acres, more or less, including a tract of one hundred and twenty-six acres, more or less, known as the Hawkins tract; also two horses and wagon and farming untensils; to hold and to have absolute and full control of during her natural life and at her death to be equally divided between my four children, to wit: Margaret J. Dicks, William J. Flynt, James D. Flynt, and Walter M. Flynt, share and share alike; but if either of my children shall die without leaving a child or children living at their death, then and in that case it is my will and desire that the portions of such so dying as aforesaid shall go to the survivors of them and their heirs forever."

2. That Margaret J. Dicks, one of the children named in said will, died before her mother, Mrs. Minerva Flynt, the life devisee, and before any of the other children of said testator, leaving her surviving three children, the plaintiffs, James William Dicks, Lou Claudia Cates, and Minerva Lee Dicks.

3. That after the death of Mrs. Minerva Flynt, the life devisee, a partition of the lands set forth in said will was duly made between the surviving children of the testator, to wit: William J. Flynt, James L. Flynt, Walter M. Flynt, and the children of Margaret J. Dicks, deceased, to wit: James William Dicks, Lou Claudia Cates, and Minerva Lee Dicks, and one-fourth in value of said land assigned in said partition to the said children of Margaret J. Dicks, as representing their

mother. That the tract of land described in the petition, containing 184 acres, was assigned in said partition to James L. Flynt, one of the children of William H. Flynt, named in said will.

4. That on 24 January, 1912, James L. Flynt and his wife conveyed by proper deed the 184 acres of land described in the petition to Walter M. Flynt and William J. Flynt, which deed is recorded in the register's office of Stokes County, in Book No. 56, p. 214; and thereafter, on 27 July, 1912, the said Walter M. Flynt and William J. Flynt, together with their wives, conveyed by proper deed with warranty the said 184 acres of land to R. M. Cardwell and J. H. Moore, which deed is recorded in the office of the register of deeds for Stokes County, in Book No. 56, p. 354.

5. That on 12 August, 1912, R. M. Cardwell and wife and J. H. Moore and wife conveyed by proper deed to the defendant John A. Young 80 acres, more or less, of the 184-acre tract of land set out in the petition herein, being the same tract described in the answer of John A. Young herein, and of which he claims *sole seizin*; that on 5 October, 1912, the said R. M. Cardwell and wife and J. H. Moore and wife conveyed by proper deed to one Hunter Manual 63½ acres, more or less, of the 184-acre tract set out in the petition herein, being the same tract described in the answer of Roscoe Gann herein, of which he claims *sole seizin* through *mesne* conveyances from the said Hunter Manual; that on 23 December, 1913, the said R. M. Cardwell and wife and J. H. Moore and wife conveyed by proper deed the remainder of the 184-acre tract of land described in the petition herein to the defendant J. Frank Dunlap, said remainder containing 47.75 acres, more or less, and being the same tract of land set out in the answer of J. Frank Dunlap, of which he claims *sole seizin*.

6. That Walter M. Flynt, one of the children of William H. Flynt, named in the will of William H. Flynt, died before his brother James D. Flynt, leaving him surviving his children, the defendants Cary Flynt, Ethel Tilley, Ella Flynt and Hilary Flynt, and that after the death of the said Walter M. Flynt, James D. Flynt, one of the children of William H. Flynt, named in his will, died without issue, leaving him surviving his brother William J. Flynt, as the last survivor of the children of the testator, William H. Flynt, and also left him surviving the children of Walter M. Flynt and Margaret J. Dicks hereinbefore named.

7. That William J. Flynt and Cary Flynt disclaim any interest in the lands set forth in the petition herein, and the defendants John A. Young, J. Frank Dunlap, and Roscoe Gann claim *sole seizin* of their respective boundaries of said land, set forth in their respective answers, by *mesne* conveyances from William J. Flynt, the last survivor of the children of William H. Flynt, named in his last will and testament.

His Honor held and entered judgment accordingly that the plaintiffs, who are the children of Margaret, are entitled to one-third of the land, and the defendants excepted and appealed.

E. B. Jones and McMichael & Johnson for appellees.
N. O. Petree and J. D. Humphreys for appellants.

ALLEN, J. The land in controversy is the share allotted to James D. Flynt, who had no child at his death, and who left surviving him a brother, William J. Flynt, and children of his deceased brother, Walter M. Flynt, and of his sister Margaret.

Do the children of Walter and Margaret take under the will or does the share of James go to William J. Flynt, who is the sole survivor of the four children named in item 3 of the will?

The determination of the question depends on the proper construction of the language "but if either of my children shall die without leaving a child or children living at their death, then and in that case it is my will and desire that the portions of such so dying as aforesaid shall go to the survivors of them and their heirs forever," and particularly of the words "survivors of them and their heirs forever."

The primary rule, which has been adopted by the courts as a guide, is to ascertain the intention of the testator from an examination of the whole will, and it is his intent when the will was made, and not what it may be supposed he would do with his property under changed conditions, that controls.

It is also a correct principle, applicable alike to statutes, contracts, wills, etc., that "The intent of the framers and parties is to be sought, first of all, in the words employed, and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. Black Inter. Laws, 37." *Kearney v. Vann,* 154 N. C., 315.

The testator here uses no language that is not easily understood. He gives a large tract of land to his wife for life, and after her death to four children, who are named. He then provides that if either of the four children die without leaving a child living at "their death" the share of such one so dying shall go to "the survivors *of them,*" which can only mean survivors of the four children.

In Underhill on Wills, Vol. I, sec. 351, the rule of construction, as applied to facts like ours, is stated as follows:

"A question of construction frequently arises where the testator devises property, whether real or personal, to several devisees or to a class, *but if any of them should die without leaving issue,* or during minority, or on another contingency, his share to go *to the survivor or survivors,* and one or more of the primary devisees dies *without* leaving issue or under age, while others die leaving issue or attain majority. The question arises in disposing of the shares of those who die *without issue* whether the children of deceased legatees shall participate, or whether it is to go only to the actual *survivors of the original class.* The plain and strict signification of the word 'survivor' is one who outlives others, and in the above devise the word should receive its strict meaning, *excluding the children, and also the next of kin of those who have died before distribution.* This natural meaning will be given to the words, and those only will take as survivors who are living at the death of the others without issue, in the absence of anything in the will clearly showing that the testator has employed the word with any other intention.

"This rule of construction is applied to a limitation to survivors, though the testator has in fact expressly provided that the children of a deceased legatee shall take, by representation, the share which *their* parent had enjoyed. Though they may take *this,* they cannot take the share of one who has died without issue, for *that* goes to those only who survive the legatee so dying."

In case of *Threadgill v. Ingram,* 23 N. C., 577, the clause in the will which was construed, to wit: "I leave the whole of my other estate, as well negroes as goods and chattels, to be equally divided between my four children, John, Tabitha, and Nancy and Jesse Ingram; my executors to pay off each child's part as they shall come to age; the boys to have their part when they come to the age of twenty-one, and the girls to have their part at the age of eighteen years. And if either of my children die without heirs lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever," is very much like the will now before us.

John Ingram died in the year 1800, leaving two children; Jesse Ingram died in the year 1835, without issue; Tabitha Ingram died in the year 1836, and the plaintiffs Threadgill were her administrators, and Nancy Ingram was still alive at the time of the suit.

In that case it was contended that the children of John Ingram (John having died before his brother Jesse) were entitled to share in the property devised and bequeathed to Jesse, but the Court held otherwise. In that case it was contended that the four superadded words, to wit, "and their heirs forever," would let in the children of John to share in the property of Jesse, devised and bequeathed in the will, although Jesse had died without children, but such contention was not sustained by the Court, the Court saying, "Must not the representative deduce his title by averring that his principal was a survivor? Could the representative have any pretense of claim without such averment? We think he could not. If, therefore, the representative's principal was actually the survivor he, the principal, must inevitably be permitted to take personally, and all chances of a perpetuity would of course cease. In the case now before the Court, the superadded words ('and their heirs forever') appear to us to have been inserted only to denote the extent of the interest in the property, that the survivors should take, and not as a limitation to a description of persons who might at any indefinite time claim as heirs. How could a person claim as heir to a survivor if the ancestor was not *in esse* at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us that no other presumption can arise in this case, but that the testator intended a personal benefit to the survivors, and that the superadded words which he made use of do not repel the presumption.

"Secondly. John died in the year 1800. Did his two children or his representative take? We think they do not take. The executory devise to John, in the legacy given to Jesse, was contingent; and as John did not survive Jesse, the executory devise never vested in him; and, therefore, there was nothing to be transmitted either to his representative or children."

All of the cases in our Reports, and many of the authorities elsewhere, are considered in *Ham v. Ham,* 168 N. C., 486, and the same conclusion reached.

We are therefore of opinion his Honor was in error in holding that the children of Walter and Margaret take any part of the share of James under the will.

Reversed.

DANIEL ALLEN, FOR HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF RALEIGH v. THE CITY OF RALEIGH ET AL.

(Filed 3 June, 1921.)

1. Constitutional Law—Taxation—Statutes—"Aye" and "No" Vote—Journals.

The provisions of Art. II, sec. 14, of the State's Constitution requiring, among other things, that the "Yea" and "Nay" vote shall be entered on the journal, in order for the people of the State, cities, or towns therein to pledge their faith or credit, etc., are mandatory, and the journals of each house, respectively, afford the only competent and sufficient evidence as to the procedure in a given case, and unless it affirmatively appears from these journals that the constitutional requirements have been complied with, the statute, in so far as it affects the specified measures, must be held invalid.

2. Same—Amendments.

Where a bill has passed both branches of Legislature, complying with our State Constitution, Art. II, sec. 14, as to the pledging of credit by the State, counties, cities, and towns, a motion to reconsider may be had by a *viva voce* vote; and where allowed its effect is to abrogate the vote passed on the question and to again bring it forward to be discussed and decided in the same manner as it was originally for the consideration and determination of the General Assembly; and for the act to be valid the final result must have complied with the constitutional requirements as to its reading on the several days, the taking of the "Aye" and "Nay" vote, and their proper entry upon the respective journals.

3. Same—Repealing Clauses of Invalid Statutes.

Where a statute enacted to afford the means to carry on the purposes of well ordered government in respect to debt and taxation has been declared unconstitutional and invalid, it will not be held that it was in the legislative contemplation that if these provisions failed the local governments be left without any powers in these necessary matters; nor will this result be affected by a repealing clause in the invalid statute, which contemplates that the new act would take the place of the former one that it purports to repeal; for in such instances the repealing clause falls with the invalid act, of which it is a part.

4. Constitutional Law—Municipalities—Cities and Towns—Taxation.

Held, the Municipal Finance Act of 1921, with its repealing clause, being unconstitutional and invalid as to contracting debts and levying taxes, the laws now in force and effective on these subjects are Consolidated Statutes, secs. 2818 to 2867, inclusive; and under these laws counties, cities, and towns and taxing districts are restricted from levying a tax rate that will realize an amount greater than 10 per cent in excess of the tax collected by them for the year 1919, and prohibited from further increasing their net municipal indebtedness by an amount greater than 10 per cent on the average assessed value of the property for the next preceding three years.

5. Same—Injunction.

The present proposed tax, to be levied by the defendant in this case, being an increase of its indebtedness in excess of the limit now imposed on cities, etc., by statute, its collection must be declared invalid, and further procedure to collect the same permanently enjoined.

APPEAL by defendant from *Connor, J.*, at the May Term, 1921, of WAKE, a jury trial having been duly waived.

On the hearing it appeared that the city of Raleigh, through its proper officials, in May, 1921, had passed two ordinances, one laying a tax of $1 on the one-hundred-dollar valuation of property subject to tax in the city limits, for current and general purposes for the years 1921 and 1922, a second ordinance of same date providing for the issuance of city bonds to the amount of $1,400,000 for the purpose of constructing and laying sewers, and had the purpose of presently carrying into effect the provisions of these ordinances, and the suit is to restrain such purpose and have the ordinances declared void on the ground that the city government was without power to pass same, and for the reason chiefly that the statute purporting to confer such power and under which defendants claimed to act, Municipal Finance Act, 1921, had not been passed according to constitutional requirements of Art. II, sec. 14, of the Constitution; and further, that under existent conditions the laws in force and controlling on the subject are such as to render the proposed measures invalid.

The court being of opinion that the portions of the Municipal Finance Act under which the city government was endeavoring to proceed was unconstitutional, and that the proposed measures were in violation of the statutes applicable, gave judgment that the defendants be permanently enjoined, and defendants excepted and appealed.

William B. Snow for plaintiff.
John W. Hinsdale, Jr., for defendants.

HOKE, J. The Constitution, Art. II, sec. 14, makes provision as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

This provision of our organic law, said in some of the cases to have been established with a view of obtaining more careful deliberation on these important subjects of debt and taxation and insuring the presence of a lawful quorum and a proper placing of responsibility, has been very insistently enforced by the courts, and in various decisions construing the section it has been held that its provisions are mandatory, that the journals of each house respectively afford the only competent and sufficient evidence as to the procedure in a given case, and unless it affirmatively appears from these journals that the constitutional requirements have been complied with, the statute, in so far as it affects the specified measures, must be held invalid. *Guire v. Comrs.*, 177 N. C., 516; *Woodall v. Comrs.*, 176 N. C., 377; *Claywell v. Comrs.*, 173 N. C., 657; *Comrs. v. Bank*, 152 N. C., 387-390; *Comrs. of New Hanover County v. DeRosset*, 129 N. C., 275; *Comrs. v. Snuggs*, 121 N. C., 394; *Union Bank v. Comrs. of Oxford,* 119 N. C., 214.

This being the law applicable to the principal question presented, it appears from a perusal of the record, and his Honor so finds, that the statute containing the provisions as to incurring of debts and levying of taxes, under which the city is purporting to act, was read three times in the House of Representatives on three different days, and the yeas and nays on the second and third readings were entered on the House Journal as the Constitution requires; that the same formalities were originally observed in the Senate, but it appears further that for the purpose of allowing an amendment on motion the Senate reconsidered its action by which the bill passed its third reading. The bill was amended, and as amended was passed by *viva voce* vote, which was subsequently concurred in by the House, and that no third reading of the bill was afterwards had, on which the yeas and nays were entered in the Senate Journal. It is recognized that the motion to reconsider may be had by a *viva voce* vote even on a measure requiring an aye and no vote for its passage, 25 R. C. L., p. 883, citing *Andrews v. People,* 33 Colorado, 193, and in the absence of established rule to the contrary, it is uniformly held that when properly passed it abrogates and entirely nullifies the legislative action to which it relates, Cushing's Laws & Practice of Legislative Assemblies, secs. 1264-1278, inclusive; *State v. Foster,* 7 N. J. L., 101. In sec. 1278, the approved position is said to be: "When a motion to reconsider prevails it has a two-fold effect: first, it entirely abrogates the vote passed on the question, which is thereby ordered to be reconsidered; secondly, it again brings forward the question to be discussed and decided in the same manner as it was originally for the consideration and determination of the Assembly."

As a parliamentary motion it was devised and introduced for the purpose of enabling a legislative body to change its vote on a pending measure while still under its control, and to do so as stated by entirely abrogating its previous action, and both on reason and authority, therefore, as well as a matter of correct definition, such action must be considered as if it had never taken place. It thus appears that there has never been a third reading of this bill in the Senate on which the ayes and noes have been entered on the journal, and provisions of the law in question, appertaining to the incurring of indebtedness and the imposition of taxes, must be held unconstitutional and void, and this is so whether the amendment to the statute was or was not material. This being true, the questions further presented are: What is law now controlling on matters of this kind, and under such law can the proposed measures be upheld? The law we are considering purports to amend and reënact the Municipal Finance Act of the Consolidated Statutes, giving increased powers as to the contracting and providing for debts and levying taxes. It contains provision, however, among others, that if any portion of the act should be declared invalid, it shall not affect the part that remains, but the objectionable features shall be "exscinded." Enacted to afford the municipalities of the State the means to carry on the purposes of well-ordered local government, it clearly did not contemplate that if these provisions failed, the local governments should be left without any powers whatever in these necessary matters, and although the act contains a general repealing clause as to inconsistent legislation, it is subject to the recognized principle of statutory construction that when a repealing statute is invalid the repealing clause itself fails with the statute of which it is a part. The position is very well stated in 25 R. C. L., title Statutes, sec. 166, at p. 913, as follows: "Where a repeal of a prior law is inserted in an act in order to secure the unobstructed operation of the act and the repealing law is itself held to be void, the provision for the repeal of the prior law will fall with it and will not be operative in the repeal of the prior law unless the language of the repealing clause is such as to leave no doubt as to its intention to repeal the former law in any event. Where, however, it is not clear that the Legislature, by a repealing clause attached to an unconstitutional act, intended to repeal a former statute upon the same subject except on the supposition that the new act would take the place of the former one the repealing clause falls with the act of which it is a part." And the authorities cited are in full support of the statement. *State v. Beend,* 121 Ind., 514; *People v. Meusching,* 187 N. Y., 8, reported also in 10 Anno. Cases, 101, and 10 L. R. A., N. S., p. 625; and *Robinson v. Goldsboro,* 122 N. C., 211, is in full recognition of the principle.

The portion of the finance act of 1921 appertaining to contracting debts and levying taxes having been declared invalid, and the general repealing clause and other portions of the law giving clear intimation that unless these important provisions should be upheld, the existent law on the subject should prevail, the municipal authorities can only proceed under the law as it existed when the attempted amendment was enacted, and must square their action with its requirements. On this question we find the existent law on the subject to be as contained in Consolidated Statutes, ch. 56, secs. 2918-69, inclusive, and as amended by the Revaluation Act, Laws 1919, ch. 84, and more especially in sec. 3 of the latter statute. As to the rate of taxation, the section of Consolidated Statutes based upon the old methods and prior assessments allowed the municipalities to levy a tax rate as high as $1.25 on the hundred-dollar valuation for general purposes, but this revaluation statute subsequently passed in sec. 3 referred to, being the only valid provision as to the rate of taxation now existent in reference to the revaluation, makes provision as follows:

"SEC. 3. The assessment made under the provisions of this act shall not be used as the basis for computation of taxes unless and until the same has been approved by the General Assembly, and until the tax rates levied by the State have been revised by the General Assembly, and the tax rates levied by the counties, cities, and towns and special-tax districts of the State have been revised under rules to be laid down by the General Assembly, and such rates shall in all cases be so adjusted that an increase in revenue from the general property tax of not more than 10 per cent shall be levied and collected in the year 1920 than was levied in the year 1919 in the State, and in all counties, cities, towns, and special-tax districts of the State, the rates so levied in 1920 shall in all cases become the maximum rates that can be levied by the counties, cities, towns, and special-tax districts in any year thereafter until authority is given by the General Assembly to increase them: *Provided*, that fractions of cents may be disregarded in fixing the final modified rate of tax by the State, counties, municipalities, and all other tax districts."

From a perusal of this section it clearly appears that the tax rate now allowed and provided for must be one that will not increase the amount of taxes more than 10 per cent over the amount realized under the law of 1919, and that this shall be the maximum rate that can be levied by counties, cities, towns, and special-tax districts in any year thereafter until authority is given by the General Assembly to increase them. And as to incurring new indebtedness, C. S., 2943, the law now controlling on this question provides that an ordinance for the increase of indebtedness for purposes presented in this record shall not be allowed when same will have the effect of increasing the net debt of the city, etc., by an amount greater than 10 per cent on the average assessed value of property for the past three years. On the testimony offered, the Court finds as a fact that under the ordinances in question the levy of $1 on the hundred-dollar valuation of property and under the assessment now prevailing, the revenue will exceed the 10 per cent limitation, over the amount collected in the year 1919. And that by the proposed increase the net indebtedness of the city of Raleigh will exceed 10 per cent of the average annual valuation of its property for the preceding three years.

We concur, therefore, in his Honor's ruling on both propositions, and hold as a "conclusion of law" that the enforcement of both ordinances should be permanently enjoined, for that they are in excess of the powers conferred upon the city government as to rate of taxation and the incurring of further indebtedness. We have not adverted to the statutes on the subject passed at the special session of 1920, chs. 1 and 3, for the reason that the former only professes to apply to years 1919 and 1920, and the latter on matters relevant to this inquiry is expressly and specially repealed by the law of 1921, and in terms that clearly show that an absolute repeal in any event was intended. And if it were otherwise, both of these laws in effect recognize and establish as the maximum limit of taxation the 10 per cent increase over the revenue yielded by the Laws of 1919. There is no error in the record, and the judgment restraining defendants is

Affirmed.

FAIN GROCERY COMPANY v. EARLY AND DANIELS COMPANY ET AL.

(Filed 3 June, 1921.)

1. **Frauds, Statute of—Debt of Another—Requisites of Promise—Contracts—Warranty.**

   A telegram sent in good faith at the request of a debtor to his creditor that the former is reliable and that "any justifiable claims will be taken care of promptly," is insufficient to establish a contract of guaranty, or a promise to answer for the debt, default, or miscarriage of another, there being no promise to pay the debt if the debtor should not do so, but only an expression of opinion as to his responsibility concerning it.

2. **Same—Principal and Agent—Undisclosed Transactions.**

   Where the plaintiff has agreed with his debtor, over the long-distance telephone, to release a consignment of hay at his depot, if payment were guaranteed by a certain firm doing business there, the defendant in the action, whereupon, without knowledge of this agreement the defendant wired in good faith to the plaintiff, in effect, that the debtor was reliable and would promptly take care of "any justifiable claims": *Held*, the debtor was the plaintiff's agent for the purpose of communicating to the defendant the agreement made between them, and, there being no fraud or collusion, the defendant is not liable for the debt.

APPEAL by plaintiff from *Long, J.*, at the February Term, 1921, of CHEROKEE.

Plaintiff claimed that J. S. Bateman & Company, of Cincinnati, Ohio, owed it. Plaintiff was holding Bateman & Company's hay, at Murphy, N. C. Bateman called plaintiff over the telephone, and plaintiff agreed to release the hay if Bateman would get Early & Daniels Company to guarantee the claim. Bateman then went to Early & Daniels Company, told them Fain did not want to pay Bateman's drafts because of some shortage claims which existed, and asked them to wire Fain of his standing. Early and Daniels Company then sent this telegram: "J. S. Bateman & Company reliable people. Any justifiable claims will be taken care of promptly." Bateman & Company were then in business, apparently doing well, and Mr. Boss, who sent the telegram, considered him solvent, and sent the message in good faith. Plaintiff was in a position to protect itself by holding Bateman's hay. Plaintiff trusted Bateman to make a guaranty contract with Early & Daniels Company, but Bateman did not do this. Early & Daniels Company did not know that Fain was holding the hay, nor that Fain was to release it if Early & Daniels Company would guarantee the account.

The court submitted the following issues:

"1. Did the defendant, Early & Daniels Company, falsely and fraudulently represent to the plaintiff that J. S. Bateman & Company were reliable people, and would promptly take care of any justifiable claims of the plaintiff against said Bateman & Company, as alleged in the complaint? Answer: 'No.'

"2. Did the plaintiff, upon the faith of the said representation of Early & Daniels Company, extend credit to J. S. Bateman & Company for the amount as alleged in the complaint, to wit, $291.67? Answer: 'No.' "

The court held that there was no guaranty, and upon the verdict gave judgment for the defendant, and plaintiff appealed.

J. N. Moody, J. D. Mallonee and R. L. Phillips for plaintiff.
Dillard & Hill for defendants Early & Daniels.

WALKER, J. We concur with his Honor, Judge Long, that there was no guaranty, which is a contract, or promise, to answer for the debt, default, or miscarriage of another, who is himself liable, in the first instance, for the same. *Carpenter v. Wall*, 20 N. C. (144), 279. It is in the nature of an undertaking that the thing promised by the principal shall be done and not merely an engagement jointly with the principal to do the thing. *Coleman v. Fuller*, 105 N. C., 328. The plaintiff might well have known from the face of the telegram that there was no promise by Early & Daniels Company to pay the debt themselves, if Bateman & Company did not pay it, as it contained merely a statement as to the standing of Bateman & Company, and an expression of their opinion that they would pay all just claims against them.

The following will afford sufficient illustration of the law of guaranty, as applied by the courts in actual cases: "My friend W. goes to your city for goods on a short credit. I am satisfied you will be safe in selling him any amount he may see proper to purchase. From my long acquaintance with him I do not hesitate to say he is as punctual a man as any I know." *Hardy v. Poole*, 41 N. C., 28. "The law will not subject a man having no interest in the transaction to pay the debt of another unless his undertaking manifests a clear intention to bind himself for that debt. Neither a mere request by one person that credit shall be given to another, a mere certificate to the correct moral habits of a third person, nor a mere expression of confidence that such third person will pay for goods which he is about to purchase, amounts to a guaranty." 20 Cyc., 1412 C. The following was held not to be a guaranty: "Let M. have what goods he wants on four months time and he will pay as usual." *Eaton v. Mayo*, 118 Mass., 141. "A writing recommending another as one on whose integrity and punctuality dependence may be placed, and assuring the one to whom it is addressed that the third person will comply fully with any contract that may be entered into with him, does not import a guaranty of the performance of such contract." *Clerk v. Russell*, 3 Dall. (U. S.), 415 (1 L. Ed., 660); *Russell v. Clark's Executors*, 7 Cranch., 69 (3 L. Ed., 271). *Clerk v. Russell, supra*, would seem to be identical with this case. There the language was, "You may be assured of their complying fully with any contract, or engagements, they may enter into with you," and yet this was held not to import an undertaking or guaranty, by which the party, who used the language, incurred a personal liability. Many other authorities might be cited in support of our view, but it is needless to do so, or to pursue this subject further.

The jury found that there was no fraud practiced by Early & Daniels. They did not know what the plaintiff had communicated to Bateman & Company, and that they wished them to become responsible for the debt if Bateman & Company did not pay it. If Bateman & Company concealed the facts from the defendants, it was not the latter's fault, but the wrong of Bateman & Company, for which the defendants cannot be required to answer. Plaintiff trusted Bateman & Company, as his agents, in the matter, and must look to them for redress of any injury or grievance growing out of their wrongful act. As between two innocent parties, the one who put it in the power of another, acting in his behalf, to do the injury must bear the loss.

No error.

HENRIETTA FORBES ET AL. v. W. B. HARRISON ET AL.

(Filed 3 June, 1921.)

1. **Deeds and Conveyances—Fraud—Evidence—Consideration.**

   Where the plaintiff seeks to set aside her deed given to the defendant upon an issue of fraud, relying upon the gross inadequacy of price as evidence thereof, the question of value, upon the evidence, is a question for the determination of the jury; and in this case, *Held*, the difference of value contended for by plaintiff was not so inadequate as to have been sufficient of itself, upon the issue.

2. **Instructions—Requests—Substance—Prejudice.**

   Giving requested instructions in substance and with slight changes not prejudicial to the plaintiff, cannot be held as error.

3. **Deeds and Conveyances—Fraud—Knowledge of Facts.**

   Where the beneficiary has full knowledge of the facts which he claims were not revealed to him by his fiduciary and alleged as fraud in a transaction which the fiduciary has induced, it becomes immaterial as to whether the latter revealed them to him or not, as if revealed, he would have had no better knowledge of them.

4. **Deeds and Conveyances—Fraud—Verdict—Instructions.**

A deed made by the beneficiary to his trustee will not be set aside for fraud on appeal, when, upon the evidence and correct instructions as to the law, the jury has found that the transaction between the parties was in every way fair and aboveboard, the consideration adequate, and no advantage taken by the fiduciary.

5. **Courts—Discretion—Trials—Remarks of Counsel—Statutes—Arguments—Jury.**

It is not error for the trial judge, in his discretion, to stop an attorney from reading the facts from an opinion in a related case, which would have the effect of unduly prejudicing the consideration of the jury upon the evidence, and confining him strictly to the law, where the attorney was exceeding his privilege and when there was no restriction as to his arguing the law to the jury upon the facts, and especially when the court subsequently charged them accurately and impartially thereon, following the decision in the case from which the attorney proposed to read.

6. **Deeds and Conveyances—Married Women—Privy Examination—Probate.**

The privy examination of a married woman is not invalid merely because her husband was in the same room with her at the time, when the room was sufficient in size to permit her to act separate and apart from and without any fear or compulsion of him, and her consent was given in accordance with the requirements of the law.

STACY, J., dissenting.

APPEAL by plaintiff from *Calvert, J.*, at the November Term, 1920, of CAMDEN.

On 12 September, 1917, John G. Gray died domiciled in Camden County, and intestate, leaving an estate of land and personal property worth, as defendants contended, about $12,000. Defendant Harrison qualified as administrator. About 20 September, the defendants approached the plaintiffs and asked them what they would take for their interest in the estate. Plaintiffs asked about the personal property, and were told there were two notes of $800 each and $600 in cash. The plaintiffs knew as much as, or more than, the defendants about the other personal property, which did not amount to more than $200. The plaintiffs had lived on part of the land for several years, and had cultivated it before the death of Gray, and knew the other tracts. They conferred and agreed to take $3,000 for their interest in the estate, and agreed with defendants to give them time to arrange about getting the money. When they separated it was agreed that as soon as arrangements were made for the money, defendants would notify plaintiffs, which they did in about a week. The plaintiffs then went to the home of defendant Gregory and remained all night, and next day, 20 September, went to the courthouse, had a deed drawn and executed, and deposited with the register of deeds, and then went to Elizabeth City to get the money. They failed to get it, but went back next day and received the $3,000.

The deed was acknowledged before W. M. Forbes, justice of the peace, who was also register of deeds. It seems that the husband of the *feme* plaintiff was not out of the room at the time the deed was acknowledged, but the room was of a good size, 16 x 16 feet, and the husband was in the opposite corner, he and wife having their backs turned to each other. The *feme* plaintiff testified that she signed the deed of her own free will and accord, without fear or compulsion of any one, and that she intended it as a deed conveying all her interest in the estate of John G. Gray, for $3,000. The defendants contended that the estate was not worth at the time of purchase over $12,000, and the plaintiffs that their interest conveyed by them was worth $4,000 or $5,000. The plaintiffs charged that the deed to the defendants was obtained by fraud.

John G. Gray left surviving him, as his heirs at law, a sister, Mrs. Susan Harrison, mother of defendants, and Mrs. Henrietta Forbes and her mother, and A. B. Bell, who were the children and heirs at law of G. G. Bell, half-brother of John G. Gray. This made plaintiff, Henrietta Forbes, the owner of an undivided one-fourth of the estate. At the time he qualified as administrator (17 September), defendant Harrison filed an affidavit in which he valued the personal estate at $1,300.

Two issues were submitted to the jury, as follows:

"1. Was the paper-writing in form of a deed from plaintiffs to defendants, dated 20 September, 1917, and recorded in Deed Book 10, page 276, obtained from plaintiffs by fraud of the defendants, or either of them, as alleged? Answer: 'No.'

"2. Was the private examination of Henrietta Forbes to said paper-writing, in the form of a deed, taken as required by law? Answer: 'Yes.'"

The court gave full instructions to the jury upon all the questions at issue, and they returned a verdict for defendants as above. Judgment on the verdict, and plaintiffs appealed.

Ehringhaus & Small and D. H. Tillett for plaintiffs.
Aydlett & Simpson for defendants.

WALKER, J. There was sharp controversy between the parties as to the value of the estate in question, but that was a matter for the jury, which was properly submitted to them. We cannot agree that, though there was a difference in the value, the price given for the property was so grossly inadequate as to shock the conscience of men and induce them to exclaim, "Why he got it for nothing." His Honor submitted the question of inadequacy of the price to the jury correctly, and gave to the plaintiffs the benefit of every principle of law to which they were entitled. This price was no more grossly inadequate than was that in *Carman v. Page,* 59 N. C., 37. And, besides, the jury may have found that there was no such discrepancy between price and value, as claimed by the plaintiff, and it is likely they did so, and they may also have found that plaintiffs had all the knowledge they needed, as to the value of the lands, for their own protection and for their dealing with the defendants "at arms length." *Knight v. Bridge Co.,* 172 N. C., 393, is not applicable to the extent contended by the plaintiffs' counsel. But the consideration here, as we have said, is not even gross, and that of itself is sufficient to distinguish the two cases.

Taking up the special prayers for instructions, we may say that a careful reading and analysis of the charge convinces us that his Honor fully responded to these instructions, and, at least, it was substantially done. The slight changes were immaterial, and in no degree weakened the force of the prayers. When speaking of the presumption of fraud arising from the fiduciary relation and inadequacy of price, the judge stated that in such a case the law raised a presumption of fraud in procuring the deed, and then added, "and will set it aside." We cannot possibly see how this prejudiced the plaintiffs. It rather was in their favor, as showing with what disfavor the law regarded such a transaction.

As to the other amendment to the prayers, it certainly cannot be contended, with any hope of success, that a man need be told what he already knows. The law only requires that he have full knowledge of the material facts, and if he has this, it can plainly make no difference how he acquires it. But the fiduciary must be sure that he has it, in one way or another.

Under the evidence and charge, the jury have evidently found that plaintiffs had such knowledge, and that the transaction between them and the defendants was in every way fair and aboveboard, that the consideration was adequate and that no advantage was taken by the defendants. This satisfies the rule. *McLeod v. Bullard,* 84 N. C., 516; *Cole v. Boyd,* 175 N. C., at p. 558. The consideration being fair, and there being no oppression, the jury have expressly found that the sale was free from fraud. Nothing, therefore, can impair the validity of this sale.

There is one more question: Counsel for plaintiffs attempted to read a portion of this Court's opinion in *Bell v. Harrison,* 179 N. C., 190, when, at the instance of the defendants' counsel, he was stopped by the court, which was evidently of the opinion that the portion read by plaintiffs' counsel might prejudice defendants upon the findings of fact, and would not be confined strictly to the law. The two cases grew out of the same administration, and there was grave danger of prejudicing the defendants upon the facts, if counsel was allowed to read the part of the opinion and case proposed to be read by him. There was not the least restriction of his right to argue the law to the jury, and to use the opinion in doing so, and we think his Honor properly exercised his discretion in preventing injustice to the defendants, without curtailing counsel's privilege under the statute to argue the law. Besides, the judge charged the law fully and correctly to the jury in accordance with that case, and if any technical error was committed it worked no harm.

The private examination of the married woman was properly taken. While the husband was in the room when it was taken, this did not invalidate it, as it appears that he was so far away that his presence in the room did not prevent her from expressing her will and desire in the matter to the clerk without the slightest restraint, but with perfect freedom. *Hall v. Castlebury,* 101 N. C., 153, fully sustains the probate of the deed.

The case was correctly and impartially tried, and plaintiffs have no sufficient ground of complaint.

No error.

STACY, J., dissenting.

J. C. CLENDENIN ET AL. v. W. S. CLENDENIN.

(Filed 7 June, 1921.)

1. **Deeds and Conveyances—Husband and Wife—Probate—Title.**

A deed by a married woman to convey her land will pass no interest therein when her privy examination has not been taken according to law.

2. **Limitation of Actions—Adverse Possession—Ouster—Notice.**

The use and occupation of land is not alone sufficient to confer title on the occupant, the presumption being that the title is in the true owner; and the statute will only ripen the title of the occupant when it has been adverse for the statutory period; that is, open, continuous, notorious, and hostile to the true owner, and evidenced by such unequivocal acts as will put the true owner on notice of the claim.

3. **Same—Relationship of Parties, Parent and Child.**

The husband moved with his wife upon the lands of her mother, and continued thereon with her and their children to the death of his mother-in-law and of his wife, who inherited the lands from her, and cultivated them without giving clear, definite, or unequivocal notice of his intention to exert exclusive ownership: *Held*, the character of the husband's possession was affected by the relationship of the parties, and this possession was subordinate to the superior title, inherited by his children from their mother, and could not ripen a perfect title in him.

4. **Limitation of Actions—Adverse Possession—Color of Title.**

The question of color of title to lands does not arise when the character of the possession of the claimant is not sufficient to ripen a perfect title in him.

5. **Appeal and Error—Judgments—Modification and Dismissal.**

Where a judgment has been properly entered against a party, except that it allows a greater amount for damages than found by the verdict, it may be modified in this respect on appeal and affirmed.

CLARK, C. J., dissenting.

APPEAL by defendant from *Lane, J.*, at the October Term, 1920, of IREDELL.

This is an action, commenced 1 May, 1919, to recover land, which formerly belonged to Jane E. Click, a married woman, who died intestate in October, 1901, leaving as her only heirs one daughter, Annie Fleming, and the plaintiffs, who are the children of a deceased daughter, Belle V., and of the defendant, W. S. Clendenin.

The interest of Annie Fleming has been conveyed to the plaintiffs.

The husband of Jane E. Click died in 1902, and Belle V. in 1893.

The defendant married in 1885, and the children, who are plaintiffs, were born, respectively, 18 January, 1887; 18 or 21 December, 1889; 18 December, 1891.

The defendant was permitted to introduce in evidence a paper-writing of date 10 February, 1896, purporting to be executed on 10 February, 1896, by Jane E. Click and her husband, and to convey said land to the plaintiffs, with the following reservation therein in behalf of the defendant: "It is further hereby stipulated that the said W. S. Clendenin shall hold a life estate in the above described tract of land."

The private examination of Jane E. Click was not taken, and there is no probate of the writing or other proof of its execution except that on 11 February, 1919, it purports to have been proved on the oath and examination of two witnesses to the handwriting of the subscribing witness, and was put on the record on 12 February, 1919, and there is no evidence that the plaintiffs knew of its existence prior to that time.

The defendant relied on said paper as color of title for a life estate, and that his color had ripened into a good title by seven years adverse possession. He also contended that if the paper was not color he was the owner of a life estate by twenty years adverse possession.

His Honor instructed the jury to answer the first issue "Yes," if they believed the evidence, and the defendant excepted.

The jury returned the following verdict:

"1. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: 'Yes.'

"2. What amount are the plaintiffs entitled to recover of the defendant as rent? Answer: '$100.'"

There was a judgment in favor of the plaintiffs, and the defendant appealed.

Dorman Thompson for plaintiffs.

Long & Jurney and W. D. Turner for defendant.

ALLEN, J. The paper-writing introduced in evidence by the defendant is void, and did not have the effect of passing any interest in the land to the plaintiffs or the defendant, because the land purporting to be conveyed belonged to a married woman, and her privy examination was not taken (*Council v. Pridgen,* 153 N. C., 444), and with this paper out of the way as evidence of title, the plaintiffs are the owners in fee of the land as the heirs of Jane E. Click, the former owner, and as grantee of Annie Fleming, another heir, unless the defendant has shown title by adverse possession.

There is a marked distinction between the possession and user of land, which may be by permission, or without claim of right, or without purpose to acquire title, and an adverse possession, which, is continued for a sufficient length of time, will confer title.

There is not only no presumption that the possession is adverse to the true owner (*Shermer v. Dobbins,* 176 N. C., 549), but, on the contrary, every possession is deemed to be under and in subordination to the true title, unless such possession is shown to be adverse (*Bland v. Beasley,* 145 N. C., 169), by which is meant that it is open, continuous, notorious, hostile to the true owner, and evidenced by such unequivocal acts as will put the true owner on notice of the claim.

"It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner." *Locklear v. Savage,* 159 N. C., 237.

The relationship of the parties also affects the character of the possession, and it was held in *Kornegay v. Price,* 178 N. C., 441, that the husband could not, while living with his wife on the land, acquire title against her by adverse possession, and the same was held as to the wife in *Hancock v. Davis,* 179 N. C., 283.

It is also stated in 1 R. C. L., 759, that, "As a general rule, an adverse possession cannot be predicated on the possession of the parent as against a child, or on the possession of a child as against its parent. Thus, where a father became insane, and one of his sons took the management of his farm during the rest of his father's lifetime, and remained in possession of it during the statutory period, it was held that these facts did not warrant the presumption of a conveyance to the son by the father, or of a release to him by the other heirs subsequent to their father's death. So, it has been held that the possession of land acquired by a father, under a conveyance to his infant child, and continued long after such child's minority, did not ripen into a title by adverse possession. In order that a possession of the character under consideration may become adverse, the owner must have had some clear, definite, and unequivocal notice of the adverse claimant's intention to assert an exclusive ownership in himself."

Applying these principles, there is no sufficient evidence of such adverse possession as would perfect the title of the defendant as against the plaintiffs, because there was nothing in the use of the land inconsistent with relationship ordinarily existing between parent and child, and nothing to put the plaintiffs on notice that the defendant was claiming in his own right.

The defendant married the mother of the plaintiff in 1885, and moved on the land with the "old people," who were J. D. Click and wife, Jane E. Click. He cultivated the land, and continued to use it during the lifetime of the grandparents of the plaintiff, who died in 1901 and 1902, respectively. He still remained upon the land after their death up to the present time, his children being with him, and there is nothing in the record indicating in the slightest degree that the plaintiffs knew or had any reason to know that he claimed the life estate until 1919, when the paper-writing referred to was put on the record. He had possession and used the land, but it was in conjunction with the plaintiffs, his children, who were the true owners, and therefore his possession was in subordination to their title until made hostile by some unequivocal act, and there is no evidence of such prior to 1919, and there was therefore no error in the instruction to the jury.

In this view of the case it is not necessary to determine whether the paper-writing can be used as color of title or the effect of the reservation as an adverse possession of either seven years or twenty years has not been shown.

We therefore find no error in the trial of the cause, but the judgment must be modified, as it permits a recovery of $400 for rents, whereas the jury answered the second issue $100.

Modified and affirmed.

CLARK, C. J., dissenting: The court directed the jury: "If you believe the evidence you will answer the first issue 'Yes' "—that is, the plaintiffs are entitled to recover.

This is an action by the children against the father for recovery of a tract of land. There is no substantial conflict in the evidence which is as follows: It is agreed that the land belonged to Jane E. Click, the grandmother of plaintiffs and mother-in-law of the defendant in this action. Her husband was J. D. Click. They had five children, only three of whom lived to maturity, and one of them died before his mother, leaving no children and no will. Jane E. Click died in October, 1901, leaving no will, and leaving as her heirs a daughter, Mrs. Annie E. Fleming, and the plaintiffs, who are the children of Belle V. Click, who married W. S. Clendenin, the defendant, in 1885. The plaintiffs are their children: Grace Phifer, born 18 January, 1887; J. C. Clendenin, born 18 December, 1889; and William C. Clendenin, born 18 December, 1891. Their mother died in May, 1893. The plaintiffs offered a quitclaim deed from Annie E. Fleming and her husband to them dated and registered in 1919.

The evidence of the defendant, which is not contradicted, is that he was married in 1885; that he lived with his wife's mother and father a year and a half; that his oldest child, Mrs. Phifer, was born there; that he then moved over to this part of the farm which he has since occupied, and the rest of his children were born on the farm in controversy; that from the time he occupied this piece of land, which is 110 acres of land, he has paid taxes on it and received the rents and profits; that the lines are known and visible, and there is no dispute about them; that he has been in continuous possession since that time. He put in evidence a conveyance from Jane E. Click and J. D. Click, dated 10 February, 1896, whereby they conveyed this tract of land of 110 acres (which is a different part of the land from that on which the grantors lived and died), which recites that it was conveyed to "Grace C., John A. Clendenin (since dead), Jesse C. Clendenin, and William C. Clendenin, minor heirs of W. S. Clendenin"; and after describing the land and reciting the consideration of love and affection and $1, and giving the description of the land by metes and bounds, says: "It is further hereby *stipulated* that the said W. S. Clendenin shall hold a life estate in the above described tract of land." This was not a reservation, but an essential part of the conveyance.

It is further in evidence that this deed was attested by W. W. Click, the son of the grantors, and signed by Jane E. Click and her husband, J. D. Click, and was proven and registered 11 February, 1919. Jane E. Click died in October, 1901, and her husband, J. D. Click, in October, 1902. The evidence of the defendant is that he has lived on the land continuously since he went upon it in 1886; that he put up the buildings thereon, and that he received the above deed 10 February, 1896, and has lived there continuously ever since under known and visible metes and bounds in undisputed possession, claiming a life estate, and has received all the rents and profits, and paid all the taxes. The testimony for the plaintiffs corroborates this unbroken possession.

Mrs. Fleming, witness for plaintiffs, testified that her mother and father had quite a body of land which they divided out among their three children by deed during their lifetime. The defendant testified without contradiction that he went upon the land in 1886 and erected the buildings thereon, and received this deed in February, 1896, conveying the land to his children as "his minor heirs," and stipulating a life estate to himself.

It would be a reasonable inference for the jury that he went there and erected the buildings upon a promise that that part of the land should be conveyed to his wife, and he put up the buildings thereon upon faith of such agreement. Upon the division in 1896 of the lands by deed among her three children then living, Mrs. Click conveyed this tract to defendant's "minor heirs," subject to his life estate in lieu of the tenancy by curtesy which he would have had if his wife was then living.

The ground of plaintiffs' action is that the privy examination of Mrs. Jane E. Click not being taken to the aforesaid conveyance, it was a nullity. Upon the testimony, which is practically without conflict, only three contentions can possibly arise.

1. The conveyance of 10 February, 1896, without the privy examination, was color of title. This is nowhere better stated than by *Mr. Justice Allen* in *King v. MacRackan*, 168 N. C., 623, 624, who thus sums up the law: "The deed of a married woman without privy examination, if otherwise sufficient, is color of title. *Norwood v. Totten*, 166 N. C., 648 (and numerous cases there cited), but the rule prevails as to all deeds that if they are placed upon the registry upon a defective probate they will be dealt with and treated as if unregistered (citing authorities). We must therefore treat the deeds upon which the plaintiff relies as color of title as unregistered. Prior to the Connor act of 1885, an unregistered deed was in all cases color of title if sufficient in form (*Hunter v. Kelly*, 92 N. C., 285). After the passage of that act, it was held in *Austin v. Staton*, 126 N. C., 783, that an unregistered deed was not color of title. But the question was again considered in *Collins v. Davis*, 132

N. C., 106, and the ruling in *Austin v. Staton, supra,* was modified so that it only applied in favor of the holder of a subsequent deed upon a valuable consideration, and this Court has since consistently adhered to the latter decision. *Janney v. Robbins,* 141 N. C., 400; *Burwell v. Chapman,* 159 N. C., 211; *Gore v. McPherson,* 161 N. C., 644."

It has also been held that a deed to which the privy examination of a married woman is not taken is color of title. *Janney v. Robbins, supra; Smith v. Allen,* 112 N. C., 226; *Perry v. Perry,* 99 N. C., 273. An unregistered deed is color of title. *Janney v. Robbins, supra; Utley v. R. R.,* 119 N. C., 720, and other cases. This is the rule elsewhere. 1 Cyc., 1088.

The conveyance of 10 January, 1896, was therefore color of title, and the defendant being then in possession and having held ever since then adversely until this action was begun, 1 May, 1919, has acquired an absolute title notwithstanding the failure to take the privy examination of Mrs. Click.

"It is not necessary that the entry shall have been made under color of title, nor when color of title is obtained subsequent to the entry, that any declaration shall be made or any act of publicity shown to indicate the holding thereof is under color of title, the presumption of law being that a party in possession holds under such title as he has and from the time it was acquired." *Hawkins v. Cedar Works,* 122 N. C., 87.

The terms of the conveyance under which the defendant held was to his "minor heirs" (naming them), with the provision: "It is further hereby stipulated that the said W. S. Clendenin shall hold a life estate in the above described tract of land." This is a conveyance (and not a reservation) to the defendant for life, and to his minor heirs thereafter, by all reasonable construction, for the deed must be construed by its four corners according to "its true intent disregarding technical objections." *Brown, J.,* in *Triplett v. Williams,* 149 N. C., 394, often cited since. See Anno. Ed.

Under the authorities above cited, notwithstanding the privy examination of the *feme* grantor was not taken, and the deed itself was not registered until 1919, this was color of title. The defendant Clendenin held adversely to his grantors, being in possession and continued to hold possession up to the death of J. D. Click in October, 1902, more than 6½ years. At the death of the grantors the statute continued to run against the heirs of the grantors. *Pearce v. House,* 4 N. C., 722; *Seawell v. Bunch,* 51 N. C., 195, and cases cited; *Chancey v. Powell,* 103 N. C., 159; *Frederick v. Williams, ib.,* 189; *Dobbin v. Dobbin,* 141 N. C., 219; *Holmes v. Carr,* 172 N. C., 215; and the statute continued to run as against the plaintiffs, who claim as heirs. This was clearly so as to Mrs. Fleming, who was of full age, and on the above authorities it was also good against the plaintiffs as to their half interest as heirs at law, for after the statute had begun to run between the grantors and the defendant holding adversely under their deed, the disability accruing subsequently by reason of the minority of the plaintiffs could not stop the running of the statute.

But even if the casting of the inheritance, as to one-half interest of the plaintiffs, who were then minors, could have had the effect to suspend the running of the statute, even then they would have had only three years in which to have brought this action after the disability was removed by the coming of age of each—the youngest of the plaintiffs became of age in December, 1912. C. S., 407.

If the conveyance without the privy examination of the *feme* grantor was not color of title as to the defendant, it certainly was not color of title to the plaintiffs, whose interest it was "stipulated" was not to accrue until after the defendant's life estate, and who, besides, were not in possession.

2. If the defendant's title under color of possession and 7 years possession thereof under such color did not bar this action, then certainly he was in possession from 10 February, 1896, holding, according to the evidence on both sides, sole and absolute possession, claiming adversely to Jane and J. D. Click and all the world, under known and visible metes and bounds, for 20 years, and his title ripened under that statute on 10 February, 1916. And even if the running of such title was suspended at death of defendant's grantors by the minority of the plaintiffs, they were entitled only to three years after the disability was removed to bring this action. C. S., 407.

3. Even if, contrary to the decisions, the defendant was not protected by the 7 years possession under color of title, nor by the 20 years possession adversely under known and visible metes and bounds, certainly he was protected by the adverse possession for 7 years after the oldest of the plaintiffs became of age in January, 1908, the next in December, 1910. This action was begun on 1 May, 1919, and even in that aspect of the case the plaintiffs were barred except as to the youngest, who would be entitled to one-sixth interest. The one-half interest claimed under the quitclaim of Mrs. Fleming was barred because she was of age long before any of the plaintiffs.

There is the further consideration that the plaintiffs, and those under whom they claim, have not had seizin within 20 years before this action was brought. C. S., 429.

The defendant, when this action was brought, 1 May, 1919, had been in possession of this land for 33 years. He had been in exclusive and adverse possession after the deed of February, 1896, more than 23 years. He had 7 years possession under color of title adverse to the grantors from the date of the deed. Whether the statute was 20 years or 7 years, it did not cease to run at the death of the grantors, because the plaintiffs do not hold under a conveyance for value, but are volunteers upon whom the inheritance was cast, and stand in the shoes of the ancestor. Therefore, the Connor act does not apply; and even if it had, the plaintiffs should have instituted the action within three years after disability was removed, whether it was a 20 years statute or the 7 years statute. C. S., 507.

If the deed of 10 February, 1896, was invalid as a deed because of the technical omission of privy examination, it was a valid admission, and "stipulation" that the defendant was in possession claiming a life estate which ripened by 7 years and 20 years possession. It was at least *evidence how he was holding.*

The children had neither color of title to anything until after the death of their father (according to the terms of the deed) nor possession, and the defendant's possession was adverse to the grantors, and upon their death the statute did not cease to run. *Jacobs v. Williams,* 173 N. C., 276. At the death of J. D. Click the defendant had been then more than 6½ years in sole possession, claiming the life estate under the color of title adverse to grantors under whom the plaintiffs claim.

Counsel for the plaintiffs contend that adverse possession for 7 years nor for 20 years has any validity as to a life estate. But in *Staton v. Mullis,* 92 N. C., 627, the Court held: "The deed, at least, constitutes color of title, and, accompanied with continuous adverse occupancy since its execution, during the long interval of time which has followed, is sufficient to perfect *the life estate.*"

There is no evidence that the defendant held for or in common with his children. "The father will not be presumed to have entered in behalf of his children where there is no evidence that he professed to do so, and none that they had any title," *Barrett v. Brewer,* 143 N. C., 88; and the very paper under which in this case he entered and held negatives the father's entry or holding being on behalf of the children who were to take only after his death.

It is true the statute, C. S., 430, says: "Such possession so held gives a title in fee to the possessor," but this is not prohibitive of acquiring a lesser estate by color of title and possession. "A life estate may be acquired by adverse possession." 1 A. & E. (2 ed.), 809, and cases cited.

There is no reason why if adverse possession under color can ripen a fee simple, it should not be valid to the extent of a lesser estate when claimed by the party in possession for the prescribed length of time. "Actual, open, visible possession of land is adverse" to the owner. *Patterson v. Mills,* 121 N. C., 258; *Malloy v. Bruden,* 86 N. C., 251.

The point decided in *Council v. Pridgen,* 153 N. C., 444, was that the privy examination of a free trader was requisite, but this was changed by ch. 54, extra session 1913, now C. S., 3351, which dispensed with such requirement, and so far as that case was based upon the former decisions of the Court which held that a married woman (with certain exceptions) could not contract, that was also changed, prior to the act of 1913, by the Martin act, Laws 1911, ch. 109, now C. S., 2507. It is true that privy examination is still required in a few states in some conveyances by married women, notwithstanding it has been repealed in England, in Virginia, Tennessee, South Carolina, Georgia, and indeed in most all other states. But that requirement has no bearing in this case for the reason already given, that if not complied with the conveyance is color of title, and has been ripened in this case by adverse possession.

It would be difficult to find a more unmeritorious claim than in this case. It is almost as tragic and somewhat similar to the story of King Lear; only instead of a kingdom, the controversy is over a little farm of 110 acres of seemingly poor land, which the children are impatient to get because the old man has not died. Less fortunate than Lear, there is no Cordelia among his children. He might well say to them, "You do take my life when you do take that by which I live." Shakespeare's *Merchant of Venice,* IV, 1.

The only explanation is that the defendant, having married again, these plaintiffs, who have for years been adults and have left the home, are impatient that the children of the second marriage are being raised thereon. They rely upon the technicality that the conveyance to their father in 1896, in lieu of the tenancy by the curtesy, lacked the privy examination of the *feme* grantor, but they overlooked the 7 years possession under color, the 20 years possession under known metes and bounds, and that neither they, nor those under whom they claim, have had seizin within 20 years, which are either of them sufficient to defeat this action. *Moody v. Wike, post,* 509.

The defendant went into possession of the property, in which he was later given a life estate, in 1886, put the buildings thereon, and has held it continuously and notoriously ever since, and adversely to grantors (under whom plaintiffs claim) since February, 1896. By his labor on the premises he has reared and supported these plaintiffs, and now in his old age they attempt to turn him out. The grantors themselves could not have done this after the lapse of seven years adverse possession by defendant, C. S., 428, under the deed of 10 February, 1896, and the plaintiffs, succeeding as their heirs, are in no better condition either as to the one-half interest therein, which they inherited, nor as to the other one-half, for which Mrs. Fleming has quitclaimed to them.

The plaintiffs are not subsequent purchasers for value, but volunteers, and the law applicable is nowhere better stated than in *King v. McRackan,* 168 N. C., 623, 624, and *Gore v. McPherson,* 161 N. C., 644, both by *Mr. Justice Allen,* and which are conclusive against the plaintiffs in this case. Nor do the plaintiffs claim under a common source of title, though it had a common origin, for the plaintiffs claim by inheritance from parties against whom the defendant held adversely.

As already stated, there is no conflict in the evidence that the possession by the defendant since 10 February, 1896, up to the beginning of this action, 1 May, 1919, was sole, exclusive, open, and notorious under claim of a life estate under a deed which is color of title, and also adversely under known and visible metes and bounds. If there had been any conflict of evidence the instruction to the jury would have been only the more erroneous. Judgment should have been entered of nonsuit.

There is not a *scintilla* of evidence, nor any evidence from which it can be inferred, that the father was at any time in possession for his children or jointly with them, and "it will never be presumed." *Barrett v. Brewer,* 143 N. C., 88. He entered into possession in 1886 and held for 10 years, taking the rents and profits, and putting the buildings on the land in question; the conveyance in 1896 is defective only in not having the privy examination, and under all our authorities, herein cited, this was color of title. If so, his holding began then as tenant for life, remainder to his children, not in common with them. If, however, that paper be held a nullity as a conveyance, his children took nothing. But it was a contract with himself by which he held adversely to the grantors therein, and his title has ripened by the seven years possession, by the twenty years, and the children, who have never been in possession, are barred by the fact that neither themselves nor those under whom they claim had been in possession, or had seizin, within twenty years before this action began.

J. A. BECTON v. E. A. GOODMAN.

(Filed 23 February, 1921.)

APPEAL by plaintiff from *Connor, J.,* at January Term, 1920, of CRAVEN.

Cowper, Whitaker & Allen for plaintiff.
Ward & Ward for defendant.

PER CURIAM. This was a proceeding to determine the true location of the boundary line between the lands of plaintiff and defendant. The exceptions and assignments of error relate entirely to the admission and exclusion of evidence. No new question is presented which requires discussion.

We have carefully examined the record, and duly considered the exceptions, and find no error of which the plaintiff can justly complain.

No error.

MORRIS M. ELLIS ET AL. v. JAMES BARNES ET AL.

(Filed 2 March, 1921.)

Deeds and Conveyances—Fraud—Undue Influence—Evidence—Questions for Jury.

Held, in this case the evidence of the lack of capacity of the grantor to make a deed, attacked for fraud and undue influence, taken altogether was sufficient to take the case to the jury upon the issue submitted.

Appeal by defendant from *Cranmer, J.*, at November Term, 1920, of Wilson.

This is a proceeding to sell one hundred acres of land for partition, the petitioners claiming that they are tenants in common with the defendants as the heirs of Martha Barnes.

The defendants set up two deeds, and a lease from the said Martha Barnes, under which they claim to be the owners of seventy acres of said land.

The plaintiffs reply that the said Martha Barnes did not have sufficient mental capacity to execute the deeds and lease, and also that they were procured by fraud and undue influence.

The jury returned the following verdict:

"1. Are the deeds from Martha Barnes to John R. Barnes and John A. Mayo and wife void for the want of mental capacity on the part of Martha Barnes at the time of the execution thereof? Answer: 'No.'

"2. Is the lease from Martha Barnes to John A. Mayo void because of the want of mental capacity on the part of Martha Barnes at the time of the execution of such lease? Answer: 'No.'

"3. Did John A. Mayo and wife, Mattie Mayo, procure the deed from Martha Barnes by reason of fraud and undue influence over the said Martha Barnes? Answer: 'Yes.'

"4. Did John R. Barnes procure the deed from Martha Barnes by means of fraud and undue influence over the said Martha Barnes? Answer: 'Yes.'"

Judgment was entered upon the verdict in favor of the plaintiffs, and the defendants appealed, reserving the exception that there was no evidence to support the verdict on the third and fourth issues.

O. P. Dickinson for plaintiffs.
Connor, Hill & Little for defendants.

Per Curiam. We have carefully examined the record and are of opinion there were circumstances in evidence fit to be considered by the jury on the issues of undue influence.

The evidence of the petitioners tended to prove that Martha Barnes was old and feeble; that before the execution of the deeds she had two strokes of paralysis, and that her mind was much impaired; that she had eleven children, and that the deeds purported to pass seven-tenths of her property to a son-in-law and one child, and that there was no reason for discriminating between the children; that the deeds and lease were without consideration; that the first deed was to the son-in-law, and she was then living with him; that before the execution of this deed the son-in-law had two doctors to examine her for the purpose of seeing if she had sufficient mind to make a deed; that he employed an attorney to prepare the deed, and paid his fee; that he went to Elm City to get witnesses for the execution of the deed, because, as he said, "he wanted a good element"; that he had four witnesses to the deed "to show that she was in good fix"; that he said nothing to any one about the execution of the deed prior to its execution, and that he then told John R. Barnes, a son, and soon thereafter the other deed was executed under similar circumstances.

These circumstances, considered separately, would not be sufficient to justify setting aside the deeds, but when considered together ought to have been submitted to the jury.

No error.

F. M. WYNNS v. ATLANTIC COAST LINE RAILROAD ET AL.

(Filed 2 March, 1921.)

APPEAL by defendant from *Lyon, J.*, at November Term, 1920, of BERTIE.

Civil action for damages, tried upon an alleged negligent injury to plaintiff's two mules. Verdict and judgment in favor of the plaintiff. Defendants appealed.

Winston & Matthews for plaintiff.
J. N. Pruden and Gillam & Davenport for defendants.

PER CURIAM. Upon the argument of this cause, defendants relied entirely upon their motion for judgment as of nonsuit, assigning as error his Honor's refusal to grant the same. Considering the evidence in its most favorable light for the plaintiff, the accepted position on such motion, we think the testimony was sufficient to be submitted to the jury, under authority of *Ramsbottom v. R. R.*, 138 N. C., 38.

No error.

LIZZIE ALSTON, EXECUTRIX, ETC., v. R. E. WILLIAMS.

(Filed 9 March, 1921.)

APPEAL by defendant from *Lyon, J.,* at the September Term, 1920, of WARREN.

This is an action to recover the value of certain cotton which the plaintiff alleges the defendant received as agent and failed to account for.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Frank H. Gibbs for plaintiff.
T. T. Hicks for defendant.

PER CURIAM. An examination of the record creates the impression with us that the plaintiff has probably recovered more than the defendant ought to pay, but we find no error which would justify disturbing the verdict and judgment.

No error.

CARRIE H. KINSEY, ADMINISTRATRIX, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 9 March, 1921.)

Insurance, Life—Policies—Contracts—Suicide—Evidence—Questions for Jury—Trials.

Upon the defense of suicide in an action to recover upon a policy of life insurance, evidence tending to show that the insured was a nervous, irritable, and high-tempered man; that a few minutes before he had finished eating dinner with his family and had gone into an adjoining room, and that his wife, upon hearing a noise, had gone into this room, and found her husband lying on the floor with a pistol wound, from his own pistol, evidently taken by him from the shelf of a book case in this room, where he kept it, fired from very close range into his temple, is sufficient to go to the jury upon the question of whether the defendant had intentionally taken his own life.

APPEAL by plaintiff from *Bond, J.,* at December Term, 1920, of JONES.

Civil action to recover upon a life insurance policy issued by the defendant to plaintiff's intestate, Guy T. Kinsey. The case turns upon a single question. Defendant admitted the execution of the policy and its liability thereon, unless its plea of suicide within the stipulated period was found to be valid. Only one issue was submitted to the jury, and answered by it as follows:

"Did the insured, Guy T. Kinsey, die by his own hand or act, with intent to commit suicide? Answer: 'Yes.'"

Judgment on the verdict in favor of defendant. Plaintiff appealed.

Rouse & Rouse for plaintiff.
Brooks, Hines & Kelly and T. D. Warren for defendant.

PER CURIAM. Plaintiff's chief exception is to the court's refusal to instruct the jury that the evidence was not sufficient to warrant a finding in favor of the defendant. Bearing upon this motion, the following is taken from the plaintiff's brief:

"Briefly summarized, the deceased had only a few minutes before finished eating dinner, he had left the table, going into an adjoining room. His wife heard a noise which attracted her attention. She went to the room and found her husband lying on the floor with a (pistol-shot) wound, which was shown to be in his temple, a little above and a little to the front of his right ear. The witnesses locate his body slightly different, but in the main it is agreed by all that his feet were some distance, variously estimated from two to three feet, from a book case, that his head was towards the door, and his body lying alongside of, with his right arm slightly under a table that stood between the bookcase and the door. The deceased's pistol, which usually stayed upon the bookcase, was found slightly under the bookcase from the deceased's head as it lay upon the floor, the distance to the pistol was in addition to the length of his body, two or three feet to the bookcase."

In addition, there was evidence tending to show that the intestate was a heavy drinker; that he had been drinking for two days immediately preceding his death; that he was a nervous, irritable, and high-tempered man; that the wound on his head was black and ragged, and the hair scorched, indicating that the pistol was held in close proximity to his head at the time it was fired.

Upon this evidence we think his Honor very properly submitted the issue to the jury, and that they were warranted in answering it in the affirmative.

We have carefully examined the record and plaintiff's exceptions, and find no error of which plaintiff can justly complain.

No error.

JAMES SPRUILL v. W. S. BONNER.

(Filed 9 March, 1921.)

Appeal and Error—Evidence—Verdict.

Verdicts rendered solely upon conflicting evidence as to the facts will not be disturbed on appeal.

APPEAL by plaintiff from *Bond, J.*, at October Term, 1920, of PAMLICO.

Civil action to recover the price of a carload of Irish potatoes. Verdict and judgment in favor of the defendant. Plaintiff appealed.

D. L. Ward and Z. V. Rawls for plaintiff.
F. C. Brinson and Ward & Ward for defendant.

PER CURIAM. This was a controversy over an alleged sale of 177 barrels of Irish potatoes. Upon issue joined, the jury found that the potatoes in question were not purchased by the defendant, W. S. Bonner, but that plaintiff sold the same to one M. P. McCann. This was a question of fact which the jury has answered in favor of the defendant.

We have carefully examined the record and find no sufficient reason for disturbing the verdict and judgment.

No error.

BUCKHORN LAND AND TIMBER COMPANY v. J. A. YARBOROUGH.

(Filed 9 March, 1921.)

(For digest, see *S. c.*, 179 N. C., 335.)

APPEAL by plaintiff from *Bond, J.*, at July Special Term, 1920, of CHATHAM.

Civil action to recover two tracts of land, consisting of 110 acres and 7½ acres respectively. Upon issues joined, the following verdict was rendered by the jury:

"1. Was E. J. Yarborough, at the time she executed the deed to J. A. Yarborough for the 110-acre tract described in the amended complaint, the tenant of the company from and under whom plaintiff land and timber company claims title? Answer: 'No.'

"2. Is the plaintiff land and timber company the owner and entitled to the possession of the lands described in the amended complaint? Answer: 'No.'"

Judgment on the verdict in favor of defendant. Plaintiff appealed.

A. A. F. Seawell, Hoyle & Hoyle, and Siler & Barber for plaintiff.
Baggett & Mordecai, Ross & Salmon, A. C. Ray, and W. P. Horton for defendant.

PER CURIAM. This case was before the Court at Spring Term, 1920, and reported in 179 N. C., 335. The same questions there presented and discussed are raised again on this appeal. We deem it unnecessary to reiterate what was said on the former hearing.

Upon trial in the Superior Court, the case was made to turn on the character of E. Jane Yarborough's possession of the *locus in quo.* Plaintiff contended that she occupied and held the lands as a tenant of plaintiff's predecessor in title. This was denied by the defendant, and upon issue joined there was a verdict adverse to the plaintiff's contention.

The case also involved a question of estoppel and a plea of the statute of limitations; but, after a careful examination of the record and plaintiff's exceptions, we think the verdict and judgment should stand.

No error.

STATE v. BLANCH RHODES.

(Filed 16 March, 1921.)

Criminal Law—Evidence—Corroboration.

Testimony in corroboration of the evidence of the prosecuting witness in a criminal action, in contradiction of the prisoner's testimony tending to establish an alibi, is competent.

APPEAL by defendant from *Connor, J.*, at October Term, 1920, of LENOIR.

This was an indictment for highway robbery. Defendant was convicted of larceny from the person; and from the judgment of the court upon the verdict he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. C. Wooten for defendant.

PER CURIAM. Upon trial in the Superior Court, the prosecuting witness, Jerry Pettaway, testified that Fred Stiles and the defendant Blanch Rhodes assaulted him on the night of 14 October, 1920, knocked him down and took from his person the sum of $22 in money. In corroboration of this evidence, the State offered three witnesses, who testified that on the following morning the prosecuting witness told them of the occurrence, stating that Stiles and the defendant had robbed him. This evidence was admitted only for the purpose of corroboration, and in this view it was clearly competent. This is the only exception in the record.

The defendant Rhodes went upon the stand and testified that he was at home at the time of the alleged robbery; and there was other evidence tending to support his alibi. The case presents a simple question of identification, and upon the evidence the jury found against the defendant.

We have carefully examined the record, and find no reason for disturbing the results of the trial.

No error.

F. C. BRINSON ET AL. v. S. MCCOTTER AND WIFE.

(Filed 16 March, 1921.)

Appeal and Error—Parties—Case Remanded.

A case on appeal will be remanded to make additional parties, when they appear from the agreed case to be necessary for a proper determination of the controversy.

APPEAL by defendant from *Bond, J.*, from PAMLICO, 30 December, 1920.

Small, MacLean, Bragaw & Rodman for plaintiffs.
Z. V. Rawls for defendant.

PER CURIAM. This is an action to settle the title to a tract of land, submitted upon an agreed statement of facts, and it appearing that there cannot be a complete determination of the rights of the parties in the absence of the heirs of Ellis H. Pickles, it is ordered that the cause be remanded to the Superior Court in order that the said heirs be made parties to this action with the right to plead, or if so advised, they may make themselves parties in this Court and adopt the agreed statement of facts.

J. H. HILL ET AL. v. A. W. AMAN ET AL.

(Filed 16 March, 1921.)

Appeal and Error—Objections and Exceptions—Briefs.

Appellant's exceptions of record, not brought forward in his brief, are deemed abandoned in the Supreme Court. Rule 34.

APPEAL by defendant Aman from *Connor, J.*, at September Term, 1920, of SAMPSON.

Civil action, tried upon exceptions to report of referee. Upon the hearing his Honor modified the findings of the referee in some particulars, and as thus amended the same was adopted and approved and judgment entered thereon in favor of the plaintiff. Defendant A. W. Aman excepted and appealed.

Grady & Graham and H. E. Faison for plaintiff J. H. Hill.
Butler & Herring and John D. Kerr, Sr., for defendant Aman.

PER CURIAM. There are only three assignments of error in the record: (1) That the court erred in not setting aside the findings of fact by the referee; (2) that the court erred in not sustaining the defendant's first exception to the referee's finding of fact; and, (3) that the court erred in not sustaining the defendant's first exception to the referee's conclusion of law. While these assignments of error appear in the record, they do not seem to have been brought forward in defendant's brief; and, therefore, are deemed to be abandoned under Rule 34. Notwithstanding this irregularity, we have examined the record and find no error of which the defendant can justly complain.

The controversy was largely one of fact. It appears upon the face of the record that the case was heard with care and with due regard for the rights of the parties.

No error.

J. J. BARDEN, JR., v. AMERICAN RAILWAY EXPRESS COMPANY ET AL.

(Filed 23 March, 1921.)

Carriers of Goods—Express Companies—Injury to Stock—Negligence—Presumption—Evidence—Questions for Jury—Trials.

Under a contract of shipment with the carrier, an express company, the consignor was furnished with free transportation under an agreement that he would go in the same car with and care for his stock to a certain place en route, which he did, but there took a different train to destination: *Held*, the presumption of negligence on the part of the express company arising from delivery of some of the stock injured while being transported is not rebutted by the fact of free transportation of the consignor under the terms of the contract; and evidence that before reaching the intermediate point an animal was injured in his foot by a nail in the car, and thereafter another died from an injury to its back; is sufficient to take the case to the jury.

APPEAL by defendants from *Connor, J.*, at the November Term, 1920, of DUPLIN.

This is an action to recover the value of one gray mare and one mule.

On 13 November, 1917, the plaintiff purchased a carload of stock in East St. Louis, Mo., consisting of twenty-one mules and eight horses, to be shipped to Warsaw, N. C. The stock were loaded on the car about 7 p. m., and left at 8 p. m. the same day; none of the stock were lame or sick, and they all appeared to be in good condition. The plaintiff entered into the written contract set out in the record, and was furnished a free pass to accompany the stock as far as Washington, D. C., and agreed on his part to look after the stock, care for, feed, and water them. Plaintiff left on the same train with stock, which reached Harrisburg, Pa., about 5 a. m., 15 November. The stock were unloaded and fed at Harrisburg, and the mule was lame when driven off the car at Harrisburg, and the horses were in good condition.

Plaintiff then left Harrisburg with the stock, went on to Washington, D. C., and on to Richmond, Va., and he saw the stock at Richmond. At Richmond plaintiff bought a ticket, took a berth and went to bed. And the stock reached Warsaw on the morning of the 17th, one day after the arrival of the plaintiff, although the agent of the defendant told the plaintiff at Richmond the car of stock would go on same train with him, and when unloaded the mule was still lame, and after reaching plaintiff's stable a wire nail was found in his foot; the gray mare appeared to be paralyzed when stock was unloaded, hurt on the back, and died in a day or two. The mule got better and was sold.

The evidence of the plaintiff tended to prove that the injury to the mare was caused by something falling on her back, and that the nail in the foot of the mule was in the car when the shipment began.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Gavin & Blanton for plaintiff.
Stevens & Beasley for defendants.

PER CURIAM. All of the exceptions of the defendant raise the same question, and that is whether there was sufficient evidence to be submitted to the jury.

The defendant does not deny the proposition that proof of loss or damage while in its possession or under its control makes out a *prima facie* case in favor of the plaintiff, but it contends that this principle has no application because of the agreement to give the plaintiff free transportation, and that he would feed and care for the stock.

There is authority for this position, although it is held by some of the courts that such a stipulation in a bill of lading is void because it is a contract to relieve the carrier of its common-law duty (see *R. R. v. Fagan,* 13 A. S. R., 776; *Heller v. R. R.,* 63 A. S. R., 554; *Stiles v. R. R.,* 130 A. S. R., 461), but however this may be, it cannot prevail, and cannot rebut the presumption arising from injuries and damage sustained while in the possession of the defendant, except where the damage is caused by the failure of the plaintiff to perform his agreement and in this case there is no evidence of such failure.

Again, the free transportation did not extend beyond Washington City, and up to that point did not require the plaintiff to ride in the car with the stock, and although the defendant's agent promised to do so, it did not carry the stock on the same train with the plaintiff from Richmond to Warsaw, and during this part of the shipment and for more than twenty-four hours the defendant had complete control and custody of the car of stock in the absence of the plaintiff.

Also the nature of the injuries furnished circumstantial evidence that the defendant did not furnish a reasonably safe car, and that this was the cause of the injury, and if so, the defendant was negligent.

No error.

SARAH E. NEWMAN v. THE MASONIC MUTUAL LIFE INSURANCE COMPANY.

(Filed 23 March, 1921.)

Insurance, Life—Days of Grace—Premiums—Payment.

Where, by the terms of a policy of life insurance, thirty days grace is allowed the insured for the payment of the premiums from the dates therein specified, the death of the insured within the days of grace, without having paid his last premium, does not relieve the insurer from its liability under the contract of insurance.

APPEAL by defendant from *Connor, J.,* at the September Term, 1920, of SAMPSON.

This is an action on a policy of insurance.

The facts appear in the judgment rendered in the Superior Court, which is as follows:

"This cause coming on for trial before his Honor, George W. Connor, and a trial of the issues by jury being expressly waived by counsel of both sides, who agreed that the court should find the facts, and enter judgment, etc., and upon consideration of the entire evidence submitted the court finds the following facts:

"1. That on 15 December, 1906, M. J. Newman applied to defendant company for policy of insurance, the form of policy being a 10-year renewable policy, with premiums payable quarterly.

"2. That pursuant to said application, policy numbered 6,640 was duly issued on 3 December, 1906, payable to plaintiff Sarah E. Newman, upon proper proof of the death of her husband, the insured, provided the policy was in force at the time of his death.

"3. By the terms of said policy it was expressly stipulated that thirty days grace would be given for payment of any premiums after the first without interest, and the policy should be null and void immediately after the time of grace allowed for payment of any premium had expired.

"4. By the terms of said policy it was further stipulated that the same might be exchanged (without reëxamination and without written application to the association at any time before its expiration when no premium was due and unpaid) for any other form of policy written by said association. (Whereby the association's liability shall not be increased, or premium rate lowered.) The new policy to run from the date of the surrender of this policy, at the rate of premium then chargeable by the association, on policies of that date, at the then age of the insured.

"5. That by the terms of said policy it was expressly stipulated that the privilege was given for renewing said policy without reëxamination for successive periods of ten years each, before the expiration of each period the premiums for new periods to be increased with the increased age of the member according to table of rates stated and printed upon the policy, and to be payable on the dates mentioned therein.

"6. That said M. J. Newman paid all the premiums on said policy up to and including the quarterly premium due 1 October, 1916, and said policy by its terms would have expired on 31 December, 1916.

"7. That on 4 December, 1916, defendant company wrote a letter to said Newman, calling his attention to the fact that his policy would expire 3 December, 1916, and if he renewed it for another period of ten years the quarterly premium due 31 December, 1916, would be $23.44, in which letter the said company directed his attention to his rights to exchange this policy to a whole-life policy, setting forth the advantages to the insured of the exchange.

"8. That on 13 December, 1916, the defendant company again wrote Newman a letter, acknowledging its receipt of its letter of 12 December, 1916, setting forth in full the terms and provisions in accordance with which he might take a whole life policy, and by said letter advised the insured further as follows: 'You of course have until 30 January, 1917, to pay the premium due 31 December, 1916.'

"9. That on 15 December, 1916, the defendant company forwarded to insured a notice by postal card, advising him that the premium on his policy of $23.44 would be due 31 December, 1916, and this premium would keep his policy in force till 1 April, 1917, and that said notice was duly received by said Newman.

"10. That on 3 January, 1917, the insured, M. J. Newman, wrote defendant company advising it that he was unable to avail himself of his privilege of exchanging his 10-year renewal policy for a whole-life policy.

"11. That on 3 January, 1917, the defendant company wrote said M. J. Newman a letter advising him that no reply had been received from him to its letter of 13 December, 1916, relative to the exchange and conversion of the 10-year policy into a whole-life policy, and further advising him that it had mailed him, on 15 December, 1916, its regular postal-card notice for the quarterly premium of $23.44, due December, 1916, under his 10-year term policy, and further advising him that if he desired to make the change it would adjust his premium accordingly.

"12. That on 23 January, 1917, the insured died, was buried 24 January, 1917, and on 25 January, 1917, the plaintiff, through his attorney, Henry E. Faison, Esq., duly mailed notice of insured's death to the defendant company at Washington, D. C., and requested its blanks upon which proofs of his death could be made.

"13. That replying thereto on 26 January, the said company wrote the said attorney for plaintiff, acknowledging receipt of the proofs of death of M. J. Newman requesting the same to be filled up and returned, and further stating, 'That this association does not take advantage of technicalities in settlement of policies.'

"14. That said blanks were duly filled out and returned to the company on 27 January, 1917, and on 3 February following the defendant company advised said attorney that the proofs of death had been duly received, but declined to pay the plaintiff anything on the policy.

"And upon the foregoing facts, the court being of the opinion that the policy was valid and in force at the death of the insured, M. J. Newman, adjudges that the defendant company is liable to the plaintiff herein and hereby rendering judgment in her behalf that she recover of the defendant company the sum of $2,000, less the sum of $23.44, and interest on said balance of $1,976.56 from 3 February, 1917, till paid, and the costs of this action to be taxed by the clerk.

GEORGE, W. CONNOR, *Judge.*"

From this judgment the defendant company appealed to the Supreme Court.

Henry E. Faison and James S. Manning for plaintiff.

Winston & Matthews and J. P. Schick for defendant.

PER CURIAM. The facts found are sufficient to support the judgment, which seems to be in accord with the views of the defendant before this action was commenced, as its secretary and general manager wrote the attorney for the plaintiff on 26 January, 1917:

"Mr. Newman's premium was due on 31 December, and he had thirty days grace in which to pay it. The policy was therefore in full force and effect when he died. We are therefore enclosing you the proofs of death."

Affirmed.

CATHERINE H. HART v. WOODMEN OF THE WORLD.

(Filed 30 March, 1921.)

1. **Insurance, Life—Conditions—Acceptance of Premiums—Waiver.**

   Where the insured afterwards engaged in a hazardous occupation forbidden by the policy unless upon notification given to a certain of its agents and the payment of an additional premium, and it appears that the agent had been notified of such change and the insured continued the policy in force upon the continued payment of the same premiums, the company itself waives the condition imposed by accepting the premiums, with notice, and may not declare the policy invalid and refuse to pay it upon the death of the insured.

2. **Same—Principal and Agent.**

   It is not an alteration of the conditions expressed in a policy of life insurance by an officer or agent thereof when the company itself knowingly receives the premiums until the death of the insured, without objection until then, and thus waives the condition.

3. **Same—Notice.**

   Where the insured has notified the agent of the insurer designated by its constitution and by-laws of a change to more hazardous occupation, it is sufficient.

APPEAL by defendant from *Daniels, J.*, at October Term, 1920, of NEW HANOVER.

This was a civil action to recover on a contract of insurance issued by the defendant on the life of Lee Roy Hart for the benefit of his mother, plaintiff herein.

The defendant's constitution and by-laws contain the following stipulations: (1) "If a member engage in any of the (hazardous) occupations mentioned in this section he shall within thirty days notify the clerk of his camp of such change of occupation, and while so engaged in such occupation shall pay on each assessment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended, and his beneficiary certificate be null and void." (2) "No officer, employee, or agent . . . shall have the power, right, or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary, or waive any of the provisions of the constitution and by-laws," etc.

It was admitted that after the insured had received his beneficiary certificate he changed his occupation and became a brakeman on a freight train, which is denominated in the defendant's by-laws as hazardous. The insured continued in this work for a period of more than a year, and until his death, during which time he paid the regular premiums on his certificate, but did not pay the additional 30 cents due by reason of the change in his employment.

Upon issues joined, the jury returned the following verdict:

"1. Did the plaintiff's intestate fail to give notice to the defendant within thirty days of the change of his occupation? Answer: 'No.'

"2. Was the plaintiff's intestate able and willing to pay the increased premium required for such changed occupation? Answer: 'Yes.'"

Judgment on the verdict in favor of the plaintiff for the amount of the certificate, less 30 cents per month for the time plaintiff's intestate was employed in the said hazardous work. Defendant excepted and appealed.

E. K. Bryan for plaintiff.
Joseph W. Little and George H. Howell for defendant.

PER CURIAM. The following reasons are assigned by his Honor in support of the judgment entered in the Superior Court: "It further appearing to the court that after the plaintiff's intestate changed his occupation he made to the defendant as many as twelve or more monthly payments of dues and assessments, and that the same was transmitted to the defendant by the clerk of the local camp, as required by the by-laws, and that after the death of the plaintiff's intestate, proofs of death and loss were duly made out and transmitted to the defendant, as required by the said policy of insurance, constitution and by-laws, and after the receipt of the same the defendant denied liability and refused to pay to the plaintiff, the beneficiary in the policy, the amount thereof, and that the defendant has failed and refused to return to the plaintiff's intestate or his personal representative the premiums, dues and assessments levied on account of said policy, and in filing its answer herein made no offer to return the same, but has kept the said premiums, dues, and assessments which were paid to it for the purpose of keeping in force the insurance contract sued on, and the court being of the opinion, on such facts, that the plaintiff is entitled to recover of the defendant: It is therefore ordered," etc.

The defendant takes the position that none of the provisions of its constitution and by-laws could be waived by any officer or agent, and that the failure of the insured to pay the additional thirty cents per month while engaged in the hazardous work rendered his certificate null and void. We do not think this position open to the defendant on the record. The insured was required to notify the clerk of his camp within thirty days of his change of occupation, which was done, according to the verdict of the jury. With knowledge of the changed and hazardous employment of the insured, the defendant continued to accept the dues and assessments at the old rate. This was not an unauthorized act of an officer or an agent, but the defendant's own election, deliberately made. Such was a waiver of its right to insist upon a forfeiture of the policy. *Bergeron v. Ins. Co.,* 111 N. C., 45.

It has been held with us, in a number of cases, that where an applicant knowingly misrepresents a material fact, and the company, with full knowledge of the circumstances and falsity of the statement, issues a policy, receives the premiums, and recognizes and continues to recognize the applicant as holding a contract of insurance, it ordinarily will be estopped from insisting on a forfeiture of the policy that otherwise might ensue. *Robinson v. Brotherhood,* 170 N. C., 545; *Grabbs v. Ins. Co.,* 125 N. C., 389.

It is not necessary to discuss the principle, announced in numerous decisions, that notice to the agent is notice to the company, for, in the instant case, the insured, when he changed his occupation, was only required to notify the clerk of his camp, which he did, and this was notice to the defendant. *Fishblate v. Fidelity Co.,* 140 N. C., 589. See, also, *Carden v. Sons and Daughters of Liberty,* 179 N. C., 399.

After a careful examination of the defendant's exceptions and assignments of error, we are convinced that the case was tried according to law and precedent.

No error.

NELLIE INGRAM, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 April, 1921.)

1. **Railroads—Interstate Commerce—Employer and Employee—Federal Employers' Liability Act—Negligence—Flagmen.**

A flagman upon a freight train engaged in interstate commerce, upon whom alone the duty rested to see that cars placed upon a siding were clear for the passage of the train upon the other track, and then signal the engineer to go ahead, is for the person in charge of the train, and where he has been caught between the two trains and killed by the neglect of his duty to see that the cars on the siding were clear of the other train, this negligence is attributable to him and not to the railroad's engineer or other employees, and when the proximate and only cause of the injury, the plaintiff cannot recover damages of the defendant therefor.

2. **Same—Implements—Safety Appliances—Evidence.**

In an action to recover damages for the killing of the plaintiff's intestate, engaged in interstate commerce, by being caught between the cars on defendant's pass track and the moving train of the defendant on the main track, when it appears that it was the sole duty of the intestate to see that these cars were clear and signal the engineer, his contributory negligence in not having done so is not affected by the fact that certain implements had not been furnished by the defendant for keeping the cars on the pass track from moving, when he knew that such implements had not been furnished, and if they had been, they were unnecessary on account of the grade of the pass track, and when the intestate was experienced and could have safely and reasonably performed his duty under the circumstances.

3. **Railroads—Federal Employers' Liability Act—Negligence—Employer and Employee.**

An action to recover damages against a railroad company for the negligent killing of the plaintiff's intestate, while engaged in interstate commerce, is controlled by the Federal Employers' Liability Act, and thereunder no recovery can be had when the death was caused solely by the negligent act of the intestate.

APPEAL by plaintiff from *Kerr, J.*, at the February Term, 1921, of NEW HANOVER.

This is an action to recover damages for the death of the intestate of the plaintiff, caused, as the plaintiff alleges, by the negligence of the defendant in that (1) the defendant failed to keep a proper lookout down the track; (2) that the defendant failed to have a jack-knife or derailer or other appliance on its storage track at Warsaw.

On 9 March, 1908, at about 8:30 o'clock of a dark rainy night the intestate of the plaintiff was brakeman on a freight train going from Wilmington to Rocky Mount. As the train approached Warsaw it ran into a pass track for the purpose of letting a passenger train pass on the main line. After the passenger train passed, the freight train backed onto the main line and there the engine and tender and three cars were cut off for the purpose of placing the three cars on the storage track at Warsaw. The engine and the three cars then passed through the pass track and backed into the storage track where the three cars were left.

The intestate of the plaintiff was in charge of this movement of the cars, and it was his duty after the three cars were placed on the storage track to pass down the cars on the storage track, there being then twenty-six or twenty-seven cars on the track, and see that the cars were coupled together and that the cars on the track were in the clear, by which is meant that they were to be far enough from the pass track that there would be no danger to cars or persons passing on the latter track.

It was the duty of the intestate to see that the cars were in the clear, and this duty was not imposed upon any other employee of the train, and it was the duty of the engineer to observe the signals of the intestate and follow them.

The evidence is that the intestate went to the end of the cars on the storage track and that he then signaled the engineer to back down the pass track, and he, the intestate, got up on the tender of the engine, and as the engine backed the intestate was crushed and killed between the tender and cars on the storage track, which had been left by the intestate too close to the pass track.

The intestate was an experienced brakeman and familiar with the conditions at Warsaw, and knew that there was no jack-knife or derailer there.

It was also in evidence, and uncontradicted, that without a jack-knife or a derailer or any marker that an employee could easily tell whether a car was in the clear. That he could do so by standing on the rail of the pass track and reaching out, and if his hand did not touch the car on the storage track it was clear and in a place of safety, or he could observe the curvature of the storage track as it left the pass track and if it was beyond the curve it was in the clear.

A derailer is an appliance on the top of the rail and a jack-knife one that when operated separates two rails so that the ends do not come together. The principal purpose of each is to prevent cars on side tracks from running out on the main line, although they may also operate to indicate the point of clearance.

The evidence shows that when cars were being placed in a track that it was the duty of the employee in charge of the movement where the derailer or jack-knife was located, if there was one in use, and place them so that if a car reached that point it would not be derailed or thrown from the track but would pass over the derailer or jack-knife, and that after the movement or operation was completed, to go to the point and place the derailer or jack-knife so that it would derail a car instead of letting it pass along the track.

It was also in evidence that at Warsaw there were three tracks—a main track, a pass track, and a storage track, and that the storage track was higher at both ends than in the middle. Also that when a track was built with both ends higher than in the middle, derailers, jack-knives, etc., were not in use, although one witness stated that he had known these appliances to be used in four or five side tracks on the Seaboard system.

It was also in evidence that at one time clearance posts were in use, but that these had been abolished upon petition of the employees because dangerous to them in the operation of trains.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

E. K. Bryan for plaintiff.
Rountree & Carr and Carl H. Davis for defendant.

PER CURIAM. There is no evidence to sustain the first allegation of negligence as it was the duty of the engineer only to keep a lookout for the signals of the intestate, who was then in charge of the movement of the train, and to follow his signals, and all of the evidence shows that he performed this duty.

Nor do we think that the failure to have a derailer or jack-knife had anything to do with the death of the intestate, who knew that there was no derailer or jack-knife in the storage track, and whose duty it was to place the cars and see that they were clear of the pass track, and the responsibility for the performance of this duty rested solely on him.

If a derailer or jack-knife had been in the track and he had performed his duty, before pushing the cars into the storage track, he was required to set the appliances so that the cars would pass over them, and their use would not have prevented the cars from reaching the place where the intestate left them.

He also could easily see where the cars were as they were much more easily perceived than the appliances referred to, and, according to the evidence, he could have ascertained definitely that the cars were not in the clear when he signaled to the engineer to move backward.

It appears therefore that the death of the intestate was caused solely by the failure on his part to perform the duty which had been entrusted to him alone, and under such conditions a recovery cannot be sustained under the Employer's Liability Act, which controls this decision, because the intestate was engaged in interstate commerce.

In *R. R. v. Skaggs,* 240 U. S., 66, an authority relied upon by the plaintiff, the plaintiff, a brakeman, was crushed between two cars because one had been left too near the track, and a recovery was sustained, but upon the ground that there was another brakeman connected with him in the operation of the train, and that the evidence supported the contention of the plaintiff that his injury resulted from the negligence of a fellow-servant, but the Court says, in the course of the opinion, "the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own."

The syllabus in *R. R. v. Wiles,* 240 U. S., 444, is as follows: "There is no room for the application of the rule of comparative negligence established by the Employer's Liability Act of 22 April, 1908 (35 Stat. at L. 65, ch. 149, Comp. Stat. 1913, par. 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

In *Baugham v. R. R.,* 241 U. S., 237, the facts were much more favorable to the plaintiff than in this action, and it was held that the plaintiff had assumed the risk and could not therefore recover.

Affirmed.

ARCHIE CAMPBELL, ADMINISTRATOR OF BURTON McARTHUR, DECEASED, v. WARREN PEARCE ET AL., AND LAURA PEARCE, ADMINISTRATRIX OF PETTIGREW PEARCE, DECEASED, ET AL., v. RACHEL HOLT ET AL., DEFENDANTS, AND ROBERT KELLY ET AL., INTERVENERS.

(Filed 6 April, 1921.)

1. **Reference—Order—Trial by Jury—Waiver.**

   The parties to a cause referred reserving the right to a trial by jury waive this right by afterwards agreeing that the trial judge shall find the facts.

2. **Reference—Order—Scope of Reference—Waiver.**

   Where a controversy as to title to lands has been referred and afterwards consolidated with another action involving the same title, objection that the referee acted beyond the power of the first reference is not tenable when it appears that the parties filed specific exceptions to the report and agreed that the trial judge should find all issuable matters, for their action in so doing is a waiver of the right set up.

3. **Evidence—Reference—Deeds and Conveyances—Color.**
In this action involving title to land, the evidence as to adverse possession under color was sufficient to sustain the finding of the referee and their confirmation by the judge.

STACY, J., did not sit.

CIVIL ACTION heard on report of referee and exceptions thereto. Appeal by intervenors from *Allen, J.*, at February Term, 1920, of CUMBERLAND.

Pending the controversy, Robert Kelly and other children and their descendants, heirs at law of Isabella McArthur, second wife of Burton McArthur, and born to her prior to her marriage to Burton, were allowed to intervene and claim title to the land in controversy as against the alleged ownership of the original parties, children and their descendants and heirs at law of Burton McArthur, deceased. The referee, among other things not excepted to, reported in favor of the original parties, heirs at law of Burton McArthur, and against the claim of Robert Kelly *et al.*, children, etc., heirs at law of Isabella. After hearing the cause, the court gave judgment confirming the report of the referee, and the intervenors excepted and appealed.

A. M. Moore for intervenors, appellants.
Nimocks & Nimocks, Sinclair & Dye for appellees.

PER CURIAM. From a perusal of the record it appears that Burton McArthur died in 1900, leaving several children as his heirs at law, the facts and findings being to the effect that these children and their descendants were heirs at law under Rule 13 of our Canons of Descent. That he died seized and possessed of a tract of land in controversy, having continuously occupied and possessed same under a deed conveying property to him of date in 1872. That Archibald Campbell, having qualified as his administrator in 1902, filed a petition before clerk to sell the land to make assets in due administration of the estate. On issue joined, cause was transferred to Superior Court, and at February Term, 1915, cause was referred to H. L. Brothers to state an account between estate of Burton McArthur, etc., the order providing that on coming in of report, either side may demand a jury trial. That in January, 1918, Robert Kelly *et al.*, children and descendants of Isabella McArthur, second wife of Burton McArthur, born to her prior to her marriage to Burton, made affidavit alleging that the land in question belonged to them as heirs at law of Isabella, and making averment further that said Isabella had bargained for the land and she and her children had paid for it. On this affidavit said applicants were made parties to the proceedings. That one of the heirs of Burton McArthur having died, his widow and other descendants and heirs at law of Burton McArthur, without being advertent to the original petition, instituted a suit for sale of the land for division among the heirs at law of Burton, etc. That this cause having been transferred to Superior Court at March Term, 1919, before his Honor, *W. P. Stacy, Judge,* an order was made consolidating the causes and confirming the order of reference previously made, and directing said referee to hear and determine said causes after due notice, etc. The referee, having fully heard and considered the evidence, made a full report thereon, the same among other things being against the claim of the intervenors and in favor of the heirs at law of Burton McArthur.

In order to expedite the hearing, the parties having waived the jury trial, *Judge Calvert,* at October Term, entered on hearing, and being unable to complete same, the hearing was continued before his Honor, *O. H. Allen, Judge,* at February Term, 1920, and his Honor, as stated, confirmed the findings of the referee, both of fact and law, and gave judgment for the original parties and against the intervenors, who have appealed to this Court.

Appellants object to the disposition made of the case. First, that they have been denied a jury trial, expressly reserved to them in the original order of reference.

An inspection of the record shows that such a reservation was made. But it further appears that later in the proceedings, in order to expedite the hearing, the intervenors and all others, both before *Judge Calvert* and *Judge Allen,* expressly waived their right to a jury trial, and agreed that the matters on issue should be heard and determined by the judge.

Appellants object further that the referee acted in excess of the powers conferred upon him by the order of reference.

An examination of the record, however, will show that while the original order in the first cause gave only the power to take and state an account, after the causes were consolidated the further order of reference of the "two causes" seems to be fully broad enough to hear and decide on all pertinent issues, and if it were otherwise, the appellants having attended the hearings without protest and presented all of the testimony relevant to their claims, filed their specific exceptions to the report and consented that the same be heard and determined first by *Judge Calvert* and then by *Judge Allen,* this objection should be considered as waived.

The further objection that findings of the referee in support of the ownership of the heirs of Burton McArthur are without evidence to support them cannot at all be maintained, it appearing, among other testimony, that Burton McArthur occupied and possessed the land under a deed purporting to convey the absolute title from 1872 to his death in 1900, and that the original parties to this controversy, his children and heirs at law, continued in possession thereafter to this present time.

As a matter of fact, there is very little if any valid testimony tending to support the claim asserted by the intervenors, and the ownership of the original parties, upheld both in the rulings of the referee and the judge, must be affirmed.

Judgment affirmed.

STACY, J., not sitting.

W. G. HOLMES AND WIFE, A. C. HOLMES, v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 6 April, 1921.)

1. **Carriers of Passengers—Alighting from Train—Proper Assistance—Negligence—Damages—Insult—Punitive Damages.**

   Passengers alighting from a train at a station are entitled to reasonable and proper assistance, and when the conductor has been made aware of a physical infirmity of a very old woman, and that her condition required a stepbox or an ordinary box from the lower step to the ground, which he could readily and easily have furnished, but insultingly refused to do so, the company is not only responsible in actual damages for the injury proximately caused, but in punitive damages to be awarded in the discretion of the jury.

2. **Appeal and Error—Objections and Exceptions—Evidence.**

   Exception to evidence should be specific when a part thereof is unobjectionable, and a general exception thereto cannot be sustained on appeal.

3. **Appeal and Error—Verdicts—Nonsuit—Peremptory Instructions—Evidence.**

   Verdicts of juries are accepted as right on appeal unless some legal error has been committed by the trial judge sufficient to set them aside, and unless there is such, the action of the trial judge in refusing a motion to nonsuit, or its equivalent, a peremptory instruction upon the evidence, will not be disturbed on appeal.

APPEAL by defendants from *Daniels, J.*, at November Term, 1920, of COLUMBUS.

Donald McCracken and S. Brown Shepherd for plaintiffs.
Rountree & Carr for defendants.

PER CURIAM. The *feme* plaintiff was a passenger on the train of the defendant railroad company, 19 August, 1919, traveling from Wilmington, N. C., to Bolton, N. C. She was very old and feeble and so informed the conductor, requesting him, at the time, to assist her in alighting from the train and to have a box for the purpose, which was not done. A boy who was standing near the train when it stopped at the station offered to go for a box, which was near by, but the conductor refused to let him do so, and threatened to "carry her on if she could not get off," and was rude and rough to her, using insulting language. She sat on the floor of the platform and slid or bumped down the steps after the conductor had said, "Are you coming off or not?" to which she replied, "Well, if I have to get off without any help and expose myself and hurt myself I will have to do so." She added, "He could not have talked meaner to me." She further testified that it was too far from the ground for her to step from the car, and she was severely injured in attempting to do so; that she had been ruptured and "her ruptures were torn loose"; that she nearly fainted and had to lie down for ten days and suffered great pain. The jury returned a verdict for the plaintiff, assessing the compensatory damages at $400 and the punitive damages at $100. Judgment thereon, and the defendant appealed. The two instructions requested by the defendant were sufficiently covered by the charge. The real question was whether the jury believed the plaintiff or the conductor, and they believed the former. It was the duty of the defendant's conductor to render her such assistance for alighting from the car as was reasonably necessary in her weak physical condition. She was very old and had been ruptured. The conductor was notified that she needed help; he was put on his guard, but says he forgot it. The plaintiff was entitled to proper assistance as she was aged and feeble or infirm, which, if not apparent to the conductor, was made known to him by the son of the plaintiff, and by her before she alighted. *Morarity v. Durham Traction Co.*, 154 N. C., 586; Moore on Carriers, 682; *Hinshaw v. R. R.*, 118 N. C., 1052-1055; *R. R. v. Miller*, 23 Am. St. Rep., 308. This controversy would not have arisen if conductors would always treat their passengers with proper consideration. Courtesy and politeness are cheap commodities, costing little in the beginning but paying well in the end, while rudeness never pays and often proves to be very expensive. It is the conductor's duty to see that his employer does not suffer by his omission of duty, and especially by his lack of civility and proper attention to those who, because of apparent or known feebleness, cannot help themselves or alight safely from the cars. *Lanier v. Pullman Co.*, 180 N. C., 406. The verdict may not be supported by the facts, but we must assume that it is as there is nothing to authorize us to impeach it, and we have proceeded on the hypothesis of its correctness in what we have said. There was evidence here that step-boxes were seen on the train and the use of one of them would have saved the company a vast deal of trouble and annoyance, not to speak of the money loss.

The ruling of the judge as to punitive damages was correct in every particular. There was evidence tending to show inexcusable conduct on the part of the conductor and such treatment of this old and feeble woman as justified the imposition of punitive damages, which may be allowed when there is an element of fraud, malice, such a degree of negligence as indicates reckless indifference to consequences, oppression, insult, rudeness, mere caprice, willfulness or some other element of aggravation in the act or omission causing the injury. *Holmes v. R. R.* 94 N. C., 318-323; Thompson on Carriers of Passengers, 157; 3 Southerland on Damages, 270; *Ammons v. R. R.,* 140 N. C., 198 (*S. c.,* 138 N. C., 559; *Wilson v. R. R.,* 142 N. C., 340; *Stanford v. Grocery Co.,* 143 N. C., 427; *Stewart v. Lumber Co.,* 146 N. C., 47; *Hansley v. R. R.,* 115 N. C., 607; *Lanier v. Pullman Co.,* 180 N. C., 406. The other exceptions are without substantial merit.

The objection to evidence is general, whereas some of it at least is competent. The exception, therefore, cannot be sustained. The objection should, in such a case, be specific and designate that part of the evidence supposed to be incompetent. *S. v. Ledford,* 133 N. C., 714; *Kennedy v. Trust Co.,* 180 N. C., 225-229; *Lanier v. Pullman Co.,* 180 N. C., 406.

The charge of the court submitted the case to the jury pointedly and fully, and properly refused a nonsuit and the peremptory instruction requested by the defendant. The verdict, as we have said, may be wrong, but we have to accept it as right, unless there was some error in law for which it should be set aside, and we have found none which justifies a reversal.

No error.

JOHN M. COBLE v. M. F. LEGG.

(Filed 6 April, 1921.)

The defendant pleaded in the Superior Court two counterclaims, one for $10 and the other for $45, which the verdict sustained, and the judgment deducted $55 from the recovery of plaintiff: *Held,* no error. *Machine Co. v. Berger, ante,* 246.

APPEAL by defendant from *Allen, J.,* at September Term, 1920, of ALAMANCE.

This was an action to recover $452.50 alleged to be due as commissions on the sale of three motor trucks for defendant under a verbal contract. There was conflict in the evidence which was fairly submitted to the jury. The defendant pleaded a counterclaim of $45 paid by him for freight on another truck which he alleged the plaintiff should have paid and $10 paid by him for lettering on a truck which he alleges the plaintiff had agreed to have done. The court submitted two issues:

1. Is the defendant indebted to the plaintiff? If so, how much? To which the jury responded $452.50.

2. Is the plaintiff indebted to the defendant? If so, how much? To which the jury responded $55.

And thereupon the court rendered judgment in favor of the plaintiff for the difference, $397.50. The defendant appealed.

Parker & Long, W. S. Coulter and A. H. King for plaintiff.
T. T. Hicks & Son for defendant.

PER CURIAM. Upon examination of the record and assignments of error it is apparent that the controversy was almost entirely one of fact, and no serious question of law is presented. There are three exceptions to the evidence which do not require discussion. There are also exceptions to the failure to nonsuit and refusal to charge that there was no evidence as to certain facts, and for submitting the matter to the jury, and for refusal to set aside or modify the verdict because against the weight of the evidence and to the charge, but upon careful consideration of the whole case we see no sufficient ground to disturb the result.

No error.

W. P. WARE v. SOUTHERN POWER COMPANY.

(Filed 13 April, 1921.)

Appeal and Error—Issues of Fact—Judgment—Technical Error.

Held, only issues of fact were involved on this appeal, and the judgment as to amount of plaintiff's damages was not the basis of his appeal, being apparently according to his own agreement, and no error is found.

APPEAL by plaintiff from *Finley, J.*, at November Term, 1920, of ROCKINGHAM. Action to set aside a deed for a right of way over plaintiff's lands and an agreement fixing the compensation or amount of damages therefor, plaintiff alleging that his signatures to said instruments were procured by the false and fraudulent representations of defendant's agent.

Upon issues joined, the jury returned the following verdict:

"1. Was the execution of the damage agreement referred to in the pleadings procured by fraud and misrepresentation as alleged in the complaint? Answer: 'No.'

"2. Was the execution of the right of way deed referred to in the pleadings procured by fraud and misrepresentation as alleged in the complaint? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '............'"

Defendant admitted that under the contracts it was indebted to the plaintiff in the sum of $20 and tendered judgment for this amount. His Honor gave judgment in favor of plaintiff for $20, but taxed him with the costs. Plaintiff appealed.

J. M. Sharp, J. R. Joyce and E. B. Ware for plaintiff.

Manly, Hendren & Womble and W. S. O'B. Robinson, Jr., for defendant.

PER CURIAM. The controversy between the parties in this action narrowed itself on the trial to questions of fact, which the jury have answered in favor of the defendant. We have carefully examined the record and find no sufficient reason for disturbing the verdict.

Technically, under the pleadings, plaintiff may not have been entitled to judgment for the $20, but this is not the basis of his appeal. Apparently he has been rewarded according to his own agreement. His Honor below evidently took this view of the matter, and we think the plaintiff should be content with the result.

No error.

P. V. BOONE v. J. A. NEWSOME AND WIFE.

(Filed 20 April, 1921.)

Trespass—Evidence—Verdict—Appeal and Error.

Where a verdict is rendered upon conflicting evidence and without legal error of the court, it is conclusive on appeal.

APPEAL by plaintiff from *Ray, J.*, at November Term, 1920, of GUILFORD.

Civil action for trespass which involved the true location of the dividing line between the premises of plaintiff and defendants who were adjoining landowners. The *locus in quo* is a strip of land about 28 feet wide, to which both parties claimed title and possession.

Upon issues joined, there was a verdict and judgment in favor of defendants. Plaintiff appealed.

H. W. Cobb, Jr., and Fentress & Jerome for plaintiff.
S. B. Adams and R. C. Strudwick for defendants.

PER CURIAM. Plaintiff's exceptions and assignments of error relate only to the charge of the court upon general propositions of law, and after a careful investigation of the record we find no sufficient reason for disturbing the verdict and judgment.

Plaintiff alleged that he was the owner and in possession of a certain tract of land, including the *locus in quo.* It was not denied that plaintiff and defendants were abutting property owners, but it was the contention of defendants that plaintiff's deed did not cover the land in controversy, and that their own possession of said premises was rightful and lawful. Upon this disputed question of fact the jury's verdict was adverse to the plaintiff.

The exceptions must be overruled.

No error.

J. SAMET v. I. KLAFF, TRADING AS NORFOLK HIDE AND METAL COMPANY ET AL.

(Filed 27 April, 1921.)

Contracts—Principal and Agent—Consideration—Expenses—Net Profits.

Where the principal breaches his contract to compensate his agent employed upon a stated salary and expenses, and a part of the profits derived from the sale of junk, old rags, etc., the agent, as such, was to purchase, the word "profit" as used contemplates, nothing else appearing, the net profits after deducting the expenses.

APPEAL by defendants from *Ray, J.*, at October Term, 1920, of GUILFORD.

This is an action to recover of the defendant on account of a breach of contract for labor done, services performed, expenses incurred, profits earned, and money paid out by the plaintiff for the use of the defendant.

Complaint was duly filed, and in the answer there was a general denial. Later, with the consent of the court, an amended complaint was filed wherein the plaintiff alleged that he had made a special contract with the defendant to buy old junk, rags, rubber, iron castings, etc., and that the defendant agreed to pay to the plaintiff for said services the sum of thirty-five dollars ($35) per week, all traveling and incidental expenses, and in addition thereto one-half (½) of the profits made on said articles bought by the plaintiff for the defendant.

An order of reference was entered, with directions to the referee to take and state an account between the parties and make a report to the court showing his findings of fact and conclusions of law.

The report was filed showing $2,261.30 to be due the plaintiff, of which $2,058.50 is profits.

The defendant filed exceptions to the report which were overruled, and judgment rendered in favor of the plaintiff, from which defendant appealed.

Stern & Swift for plaintiff.
Cook & Smith and Fentress & Jerome for defendant.

PER CURIAM. The contract as found by the referee is as follows:

1. That some time during July, 1918, plaintiff and defendant entered into a contract upon the terms of which plaintiff was to buy iron, rags, and other junk for defendant and defendant was to pay plaintiff thirty-five dollars ($35) per week, all traveling expenses, furnish plaintiff with an automobile, and in addition thereto account with and turn over to plaintiff one-half of all profits arising out of the junk bought by plaintiff.

It also appears from the report that the defendant is charged with one-half the difference between the cash price paid for the different articles bought by the plaintiff and shipped to the defendant and the market value, as profits, without making any deduction on account of freight and other expenses.

"Profit" implies without more, the gain resulting from the employment of capital, the excess of receipts over expenditures (3 Words and Ph., second series, 1251), and so understood the expenses must be deducted before the profits can be ascertained.

The cause is therefore remanded to the end that there may be a further hearing before the referee and a fuller report made.

Remanded.

THE STEPHENS COMPANY v. QUEEN'S HOME CONSTRUCTION COMPANY.

(Filed 11 May, 1921.)

APPEAL by defendant from *Harding, J.*, at March Term, 1921, of MECKLENBURG.

Controversy without action, heard upon an agreed statement of facts, substantially the same as those in the case of *The Stephens Co. v. Myers Park Homes Co.*, just decided.

Judgment in favor of plaintiff. Defendant appealed.

H. C. Dockery and C. H. Gover for plaintiff.
Clarkson, Taliaferro & Clarkson for defendant.

PER CURIAM. The pertinent and controlling facts in the instant case are substantially the same as those in *Stephens Co. v. Myers Park Homes Co.*, and for the reasons assigned in that opinion, just rendered—the two cases being governed by the same principles—it follows that his Honor below was correct in awarding judgment in favor of the plaintiff.

Affirmed.

RHYNE ET AL. v. MUNTER & BLUMER.

(Filed 11 May, 1921.)

APPEAL by defendants from *Bryson, J.*, at September Term, 1920, of MECKLENBURG.

This is an action to recover the value of certain furs which the plaintiff sent to the defendants to be repaired and which it is alleged the defendants failed to return.

There was a verdict and judgment for the plaintiffs, and the defendants appealed.

Stewart & McRae for plaintiffs.
A. B. Justice for defendants.

PER CURIAM. We have carefully examined the exceptions relied on by the defendants and do not find anything that would justify a new trial.

The controversy resolved itself into an issue of fact which has been settled by the verdict of the jury.

No error.

JOHN ALLEN, ADMINISTRATOR, v. BROWN BROTHERS LUMBER COMPANY.

(Filed 18 May, 1921.)

Employer and Employee—Master and Servant—Negligence—Duty of Employer—Provision.

Held, under the facts of this case, the principle applies which relieves the employer from liability when an accident to an employee has not resulted from some omission or defect which the employer is required to fulfill, in the reasonable and proper discharge of his duties, or from which some appreciable or substantial injury might be expected to occur when tested by the standard of reasonable prudence and foresight.

APPEAL by plaintiff from *Adams, J.*, at January Special Term, 1921, of YANCEY.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's intestate.

There were facts in evidence tending to show that the deceased and his younger brother, on 29 June, 1920, employed by the defendant for the purpose, were engaged in stacking lumber on the defendant's mill yard. While working upon a pile of lumber some twelve or thirteen feet high plaintiff's intestate evidently fell to the ground and was killed. There were no eye-witnesses to the accident, but within five or ten minutes after the fall his body was found lying on the ground between the pile of lumber on which he had been working and the dock. The dock was approximately fifteen or sixteen feet high and about two or three feet from the pile of lumber. "One plank that had been on the dock was down there with him, but the other planks were still on the dock." Upon examination it was discovered that his neck was broken and some foam or froth was about his mouth. Whether the intestate fell in attempting to climb or step from the pile of lumber onto the dock, or by reason of some sudden fit or fainting spell, is a matter of conjecture.

At the close of plaintiff's evidence there was a judgment as of nonsuit. Plaintiff appealed.

Charles Hutchins and A. Hall Johnston for plaintiff.
S. J. Ervin and Watson, Hudgins, Watson & Fouts for defendant.

PER CURIAM. After a careful examination of the record we have discovered no evidence upon which the defendant may be held liable as for a negligent breach of duty.

A perusal of our decisions will show that in order for liability to attach, in a case of simple, ordinary, everyday employment and where the laborer is allowed to exercise his own judgment as to how the work should be done, it must appear, among other things, that the injury has resulted from some omission or defect which the employer is required to fulfill or remedy, in the proper and reasonable discharge of his duties, and that the omission or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury might be expected to occur when tested by the standard of reasonable prudence and foresight. *Winborne v. Cooperage Co.*, 178 N. C., 88, and cases cited.

We are unable to find any error in the judgment of nonsuit.

Affirmed.

STATE v. JIM MUSE.

(Filed 25 May, 1921.)

Intoxicating Liquors—Spirituous Liquors—Statutes—Constitutional Law—Federal Constitution—Federal Statutes.

A State statute in furtherance of, and not in conflict with, the Federal Prohibition Law, may be declared a valid exercise of the police power of the State, expressly sanctioned by the Eighteenth Amendment to the Constitution of the United States.

APPEAL by defendant from *McElroy, J.*, at March Term, 1921, of BUNCOMBE.

Criminal indictment charging the defendant with transporting, receiving, keeping on hand for sale and selling spirituous and intoxicating liquors, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State. The evidence of guilt was direct and positive.

"The defendant demurred to the jurisdiction of the court for that the Eighteenth Amendment to the Constitution of the United States repealed all State laws regarding the manufacture, sale and transportation of liquor within the United States." This is the defendant's only exception.

From a verdict of guilty and judgment thereon, defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Geo. S. Reynolds for defendant.

PER CURIAM. The judgment of the Superior Court must be affirmed on authority of *S. v. Fore*, 180 N. C., 744. A State statute in furtherance of, and not in conflict with, the Federal prohibition law may be declared a valid exercise of the police power of the State and is sanctioned, in express terms, by the Eighteenth Amendment to the Constitution of the United States.

No error.

STATE v. JACK REED.

(Filed 3 June, 1921.)

1. **Appeal and Error—Objections and Exceptions—Contentions.**

   Objection to statement of the contention of a party by the trial judge to the jury must be taken at the time, or some request for other or more specific instructions, for an exception to be considered on appeal.

2. **Appeal and Error—Instructions—Expressions of Opinion—Recollection of Evidence.**

   The statement of the trial judge to the jury, in his instructions, of his recollection of the evidence cannot alone be held as the expression of his opinion thereon prohibited by statute.

APPEAL by defendant from *McElroy, J.*, at January Term, 1921, of BUNCOMBE.

The defendant was tried and convicted on a bill of indictment which charged the possession of liquor for an illegal purpose and transporting the same, and from the judgment upon such conviction he appealed to this Court. The defendant introduced no evidence. The State's evidence tended to show that the defendants went out from Asheville in search of liquor and that somewhere near Bridgewater, in Burke County, they secured five kegs of corn whiskey, paying for the same $365; that they brought it back in the direction of Asheville, reaching Oteen, about five miles from Asheville, when their car broke down; that Reed came to town, secured another car and a mechanic named George Bryant, and went out to where his broken-down car was; that while there they transferred the liquor from Reed's car to the one which he had hired and brought it to a point nearer Asheville where it was again removed and hidden. From information which the officers received they went out to this place and found two kegs, apparently fifteen gallons each, which they seized, brought to town, and had present in court at the trial.

James S. Manning, Attorney-General, and Frank Nash, Assistant Attorney-General, for the State.

Judge J. D. Murphy, W. P. Brown, and J. Scroop Styles for defendant.

PER CURIAM. The evidence of the guilt of the defendant is plenary. The exceptions relate to a statement of the contentions of the State and the defendants, and to alleged expression of opinion on the facts.

It is stated in the record that the contentions of the defendant were based on and taken from the argument of his counsel to the jury, and no objection was made or exceptions taken to the contentions given at the time the charge was delivered, neither was there any request from counsel for other or more specific instructions.

This disposes of the exceptions to the statement of the contentions, as such objection must be made at the time to afford the judge an opportunity to correct any error. *Phifer v. Comrs.,* 157 N. C., 150.

We find no expression of opinion on the facts in the charge. When the judge said, "Reed and Eller, I believe, got out and went up to that house," he was simply giving his recollection of the evidence, and he stated it correctly.

There is nothing in the record that will justify disturbing the verdict.

No error.

W. P. STEED v. DOVER LUMBER COMPANY ET AL.

(Filed 3 June, 1921.)

Appeal and Error—Reference—Findings—Evidence.

The findings of fact by the referee, approved by the trial judge, or different or additional findings by the judge, are not reviewable on appeal, when there is sufficient evidence to support them.

APPEAL by plaintiff from *Connor, J.*, at December Term, 1919, of WAYNE.

Civil action to recover damages for an alleged breach of a logging and sawmilling contract. Defendants denied liability and set up, by way of further defense, counterclaims arising out of alleged breaches of the same and other contracts by the plaintiff.

By consent, the case was referred to a referee under the statute, to hear the evidence and report his findings of fact and conclusions of law.

Upon the coming in of the referee's report, exceptions thereto were filed by both sides which were heard by the trial judge, and judgment upon the report, as amended, was entered for the defendants and against the plaintiff. This appeal, on behalf of the plaintiff, seeks a review and reversal of the judgment of the Superior Court, errors having been assigned.

A. F. Seawell and Hoyle & Hoyle for plaintiff.
ore & Dunn, Langston, Allen & Taylor for defendants.

r CURIAM. The findings of fact of a referee, approved by the trial , are not subject to review upon appeal, if supported by any comt evidence. *Dorsey v. Mining Co.,* 177 N. C., 60; *Hudson v. Mor-*162 N. C., 6; *Hunter v. Kelly,* 92 N. C., 285. Likewise where the of the Superior Court, upon hearing and considering exceptions referee's report, makes different or additional findings of fact, they d no ground for exception on appeal unless there is no sufficient nce to support them, or error has been committed in receiving or ting testimony upon which they are based, or unless some other ion of law is raised with respect to said findings. *Caldwell v.* *nson,* 179 N. C., 518; *Thompson v. Smith,* 156 N. C., 345.

careful examination of the record in the instant case discloses that l and extended hearing was had before the referee, and that his or heard the exceptions to the referee's report evidently with laboriand painstaking care. It further appears that his findings and nent are supported by the evidence. Hence, upon the record, we discovered no sufficient cause for disturbing the result.

e controversy was largely one of fact, and no material benefit would erived from discussing the exceptions *seriatim.* We find no reble error.

firmed.

JOHN T. MOODY ET AL. v. M. H. WIKE.

(Filed 3 June, 1921.)

ppeal and Error—Instructions—Verdict—Directing—Evidence—Adverse Possession—Title.

Where the title to the lands is in dispute in an action wherein claim nd delivery for logs cut therefrom has been brought, and the defendant laims under an older paper title, and the plaintiff that he has been in dverse possession under a parol exchange of lands by the original owners or upward of thirty-three years under metes and boundaries recognized y the defendant, and under a claim of right, and there is evidence to upport this claim: *Held,* reversible error for the trial judge to direct verdict in defendant's favor.

me—Estoppel.

Where there is evidence tending to show that plaintiff had acquired itle to lands by adverse possession that had been swapped by parol agreenent between the original owners, the plea of estoppel is not required for im to avail himself of evidence thereof.

APPEAL by plaintiffs from *McElroy, J.,* at May Term, 1919, of JACKSON.

The action is claim and delivery for logs cut from a certain tract of land in said county, and it was admitted by the parties litigant that the title depended on whether the plaintiffs or defendant owned the land from which the logs had been cut. His Honor in effect instructed the jury that on the evidence, if believed, the title was independent in the defendant. Verdict and judgment for defendant, and plaintiffs excepted and appealed.

Walter E. Moore, Felix E. Alley, Dillard & Hill for plaintiffs.
Sutton & Stillwell for defendant.

PER CURIAM. Defendant having the older paper title to the land under a grant of the State, No. 99, to one James Mathis, of date 28 December, 1854, plaintiffs sought to establish ownership of the *locus in quo* under a deed from one Andrew J. Brown, of date 26 January, 1887, with continuous adverse possession under said deed, and the case on appeal states the position pertinent to plaintiffs' claim as follows:

"The plaintiff sued out claim and delivery proceedings in said action for certain logs alleged to be wrongfully detained by the defendant and for damages in the sum of $600. The plaintiff claimed that he was the owner of the land from which said timber was taken by the defendant under a deed from one Brown, who had acquired the same from the defendant by virtue of a parol exchange or swap of lands as shown in the evidence. The plaintiff contended and offered evidence to show that he had been in the adverse possession of said lands under his said deed for upwards of thirty-three years, and that the defendant had always recognized the plaintiff's title to said lands, and had often pointed out the boundaries of the same as being the lands of the plaintiffs."

The record shows that there is evidence on the part of plaintiff in full support of this statement, and this being true, there was error in the charge of the court and there must be a new trial of the cause.

Plaintiffs' position, also, that he may avail himself of evidence tending to establish an estoppel against defendant by reason of retaining the land received by him in the parol exchange with Brown, and without having plead same, seems to be in accord with the authorities on the subject. *Stancill v. James,* 126 N. C., 190; *Hodge v. Powell,* 96 N. C., 64; *Fitch v. Walsh,* 94 Neb., 32.

64; *Fitch v. Walsh,* 94 Neb., 32. There must be a

New trial.

J. H. SECHRIST v. BOARD OF COMMISSIONERS OF GUILFORD COUNTY.

(Filed 7 June, 1921.)

1. **Constitutional Law — Amendments — School Districts — Private and Local Laws.**

An act automatically creating a school district coterminous with the lines of a certain township in a county, if the voters should by their ballot approve of bonds to be issued and taxes levied for the maintenance, etc., of the school district for certain purposes named in the act, is invalid under the recent amendments to our Constitution (Art. II, sec. 29), prohibiting the General Assembly from passing any local, private, or special act or resolution relating to the establishing, etc., or changing the lines of school districts. *Fairmont Graded School District v. Mutual Loan and Trust Co., ante,* 306, cited, approved, and applied.

2. **Constitutional Law—School Districts—Bonds—Taxation.**

Where an act to create a public school district is unconstitutional, Art. II, sec. 29, the provision for bonds and taxation to carry out the purposes of the act are likewise void.

3. **Constitutional Law— Validating Statutes— Voidable Statutes— Void Statutes.**

The Legislature may validate voidable prior acts of legislation, but not those which are absolutely void as being without constitutional authority to enact them.

APPEAL by plaintiff from *Finley, J.*, 26 May, 1921, from GUILFORD.

Roberson & Dalton for plaintiff.
John N. Wilson for defendant.

PER CURIAM. This is a controversy without action, tried and decided below upon a case agreed, the following being the facts:

Plaintiff asked for an injunction to restrain defendants from issuing certain bonds and levying certain taxes for graded school purposes. The injunction was refused, and plaintiff appealed.

The General Assembly of North Carolina, at its extra session in 1920, passed an act entitled "An act to establish a high school district of High Point Township, Guilford County, and to issue bonds with which to build and equip a high school building, and to provide for the payment of said bonds and for the maintenance and government of said school," ratified 20 August, 1920, constituting chapter 9 of the Private Laws of 1920, Extra Session. The said act provided that an election should be held in High Point Township, in the county of Guilford, on the question of issuing bonds of the High Point Township Central High School District for the purpose of erecting a school building and levying a tax on all taxable property and polls in said township for the purpose of paying the principal and interest of said bonds, and levying an additional tax on said property and polls for the purpose of maintaining said school; and further provided that if a majority of the qualified voters of High Point Township voted in the affirmative on said question the territory of High Point Township should constitute a central high school district, to be known and designated as the High Point Central High School District, and that the board of commissioners of the county of Guilford should issue said bonds and levy said taxes. The said act was amended by an act entitled "An act to amend chapter 9 of the Private Laws of 1920, Extra Session, relating to the High Point Township Central High School District," ratified 7 March, 1921, but the amendatory act is not involved in the questions presented in this case.

At an election held in High Point Township on 18 January, 1921, a majority of the qualified voters of said township voted in favor of the issuance of said bonds and the levying of said taxes, as provided in said chapter 9 of the Private Laws of 1920, Extra Session. At said election the voters voted for and against the issuance of said bonds and the levying of said taxes (both the taxes for the payment of said bonds and the taxes for the maintenance of said school) as a single proposition, those voting in the affirmative having voted a ballot upon which were printed or written the words "For High School Bonds," and those voting in the negative having voted a ballot upon which were printed or written the words "Against High School Bonds."

At its regular session held in the year 1921 the General Assembly of North Carolina enacted an act entitled "An act validating elections on school bonds and school taxes, and establishing the boundaries of school districts, and providing for their incorporation," ratified 5 March, 1921. This latter act provided for the validation of bonds and taxes for which a majority of the votes had been cast and of the elections at which such majority of votes were cast, notwithstanding that there were irregularities therein or no statutory authority therefor, and further provided that "the tax and bonds so voted are hereby authorized to be levied or issued, as the case may be, in accordance with the proposition so adopted at said election, and in accordance with the statute or supposed statute, whether constitutional or unconstitutional, under which said vote, acts, and proceedings were had, done and taken, and no further vote of the people shall be necessary to authorize such tax levy or bond issue."

There were three questions raised in the case:

1. Is the act of 1920 authorizing the issue of bonds and the levy of taxes for the specific purpose mentioned in the act valid legislation?

2. Could the two propositions, for school and maintenance, be voted for on one and the same ballot?

3. If the act is invalid or the method of voting illegal, could the Legislature validate the bonds and tax levies as it attempted to do?

We think that a consideration of the first of the propositions will, according to our view, dispose of the other two.

The Legislature directed that an election should be held to determine whether the bonds should be issued and the taxes levied, as provided, and that if a majority voted for the bonds and taxes the school district, to be known as "High Point Central High School District," should thereby be automatically created and established, the boundaries of which should be coterminous with those of High Point Township. This was, therefore, a new school district whose boundaries or "lines" were fixed, determined, and established by the act in question. These facts bring the case squarely within the principle of *Board of Trustees of Fairmont Graded School District v. Mutual Loan and Trust Company, ante,* 306. In that case, dealing with similar and practically the same facts, *Justice Hoke* said for the Court: "Among the amendments to the Constitution ratified and becoming effective 10 January, 1917, was one appearing in section 29, Article II, to the effect 'That the General Assembly shall not pass any local, private, or special act or resolution (among others) relating to establishing or changing the lines of school districts'; and further, that any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. 'The General Assembly shall have power to pass general laws regulating matters set out in this section.' The statute in question here purporting to authorize the formation of this district, and under which the proposed bonds are to be issued, is both special and local and in our opinion comes directly under the constitutional provisions to which we have referred, and this conclusion is not affected because it is a graded school. This applies merely to the method of conducting the school which is becoming more or less general in all schools supported by taxation, and does not withdraw the present district from the force and effect of the plain and comprehensive words of the inhibition 'that no local or private or special act shall be passed establishing or changing the line of school districts.' It is contended for the appellee that a school district having been held a *quasi*-public corporation like towns, cities, and other governmental agencies, the same is not withdrawn from control of the Legislature, by special enactment or otherwise, under the principle of the recent case of *Kornegay v. Goldsboro,* 180 N. C., 441. That decision, however, referred only to those corporations of governmental character coming under, and only affected by the amendments to Article VIII, sections 1, 2, 3, 4, and does not and is not intended to affect or control legislation of this kind, which is in direct violation of the express provision of Article II, section 29, as stated." And again: "Here the bond issue is to provide for the erection of buildings and maintenance of the graded school, that is its only purpose, and the establishment of the school being prevented because in violation of the constitutional inhibition, the bond issue necessarily fails with the principal and only purpose for which it was authorized."

The two cases cannot be distinguished, either as respects their facts or the principle of law which is common to both and must govern them. The Legislature has attempted to do something which is clearly forbidden by the Constitution, and which, therefore, is beyond its authority. If the school district cannot be established, it follows inevitably that the bonds cannot be issued, as there is no obligor for whom or in whose name they can be executed. As said in the *Fairmont Graded School case, supra:* "The Fairmont Graded School has not been established as required by our Constitution, and the proposed bond issue, which is entirely dependent upon it, and authorized only for the purpose of maintaining it, may not be proceeded with." The statute is itself invalid and nothing valid can therefore rest upon it. *Ex nihilo nihil fit.*

The other questions need hardly be considered. The Legislature manifestly could not validate what it had no power originally to enact. It can validate voidable acts but not those which are absolutely void and which it is without constitutional authority to enact. 8 Cyc., 768; *Marshall v. Stillman*, 61 Ill., 218; *People v. Lynch,* 51 Calif., 15. In the *Marshall case* it is said that, "in case of such a void proceeding, the Legislature has no power, under the Constitution, to pass a law rendering the election and subscription valid." The same doctrine is stated in *Anderson v. Wilkins*, 142 N. C., 153, that the Legislature can only validate those proceedings which it could have authorized in advance. 6 A. & E. (2 ed.), 940.

The remaining question as to the dual ballot need not be discussed. If the election is void, it would be idle to inquire whether a particular form of ballot is legal or illegal.

Counsel for defendant has asked us to reconsider the case of *Board of Trustees of Fairmont Graded School District v. Mutual Loan and Trust Co., ante,* 306, but we must decline to do so as we are more convinced than ever that it was correctly decided in every particular. It is not at all in conflict with any prior decision upon the same subject, but is in perfect harmony with all of them.

We conclude that the judge erred in deciding with the defendant. Judgment should have been given for the plaintiff, and it is so ordered.

Reversed.

STATE v. JOHN POWELL.

(Filed 2 March, 1921.)

Criminal Law—Abortion—Pregnancy—Destruction of Unborn Child—Drugs—Advice—Intent—Indictment—Evidence.

Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine, or substance with intent to destroy the child is sufficient for a conviction under C. S., 4226, the advice and intent for the stated purpose being indictable under our statute. Rev., 3618 and 3619.

APPEAL by defendant from *Devin, J.*, at September Term, 1920, of HARNETT.

Attorney-General Manning and Assistant Attorney-General Nash for the State.
Young & Best for defendant.

WALKER, J. The defendant was convicted at September Term, 1920, of Harnett County Superior Court, Hon. W. A. Devin, judge presiding, and from the judgment, upon such conviction, appealed to this Court.

The statute upon which the indictment is based is section 4226 of the Consolidated Statutes. So far as material to this appeal it is as follows: "If any person shall willfully prescribe for any woman, either pregnant or quick with child, or advise or procure any such woman to take any medicine, drug or substance whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, he shall be guilty of a felony," etc.

There was evidence that the defendant advised the prosecutrix to take a certain drug, medicine, or substance with intent to destroy the child. The essential fact charged, and which was required to be proven in the case, is that the defendant advised the woman to take the drug or other substance with intent thereby to destroy the child. *S. v. Crews,* 128 N. C., 581. This is not an attempt to commit another crime, in which case the overt act must be shown, but the act charged is the offense itself, which is denounced by the statute. It is the intent with which the drug is administered, and the purpose to destroy the child, that is made indictable under our statute, Rev., 3618, 3619; and it is not necessary for the State to show that administering the drug named would have had the desired effect. *S. v. Shaft,* 166 N. C., 407.

It is not necessary to charge or prove that the defendant procured the drug himself or that the woman actually used it. All that is necessary is to prove that he prescribed or advised its use with the illegal intent.

S. v. Brady, 177 N. C., 587. Upon these authorities the defendant seems to have been properly convicted.

The jury might very properly have acquitted the defendant, upon the evidence, as the State's case was very weak, but we cannot say that there was actually no evidence. The verdict has very little evidence of a substantial character to rest upon, but we cannot correct or reverse it, or moderate the punishment.

No error.

STATE v. C. E. ROBINSON.

(Filed 9 March, 1921.)

1. Evidence—Bloodhounds—Criminal Law.

In a criminal action, evidence that bloodhounds, that had been trained and were accustomed to pursue the human track and found by experience to be reliable therein, had been placed upon the defendant's tracks, and followed them under such circumstances as to afford substantial assurance, or permit a reasonable inference of the defendant's identification, is sufficient to be submitted to the jury with other evidence tending to show the guilt of the defendant of the offense charged.

2. Same—Nonsuit—Trials.

Where there is evidence that the defendant, charged with a secret assault with a gun, had been pursued by bloodhounds, followed by a crowd, to his home, with further evidence that he had a grudge against the one assaulted, the condition of defendant's gun indicating that it is the one that had been used; that he left the crowd and the dogs that they had followed in his yard where the dogs had identified him, without comment or protest, having first tried to account for the actions of the dogs, with the other evidence in this case: *Held,* sufficient, upon a motion as of nonsuit, to take the case to the jury.

3. Evidence—Nonsuit—Appeal and Error.

Where, in an action for a secret assault, the State's evidence is sufficient to take the case to the jury, upon a motion as of nonsuit, the defendant's contradictory evidence will not be considered.

4. Appeal and Error—Instructions—Erroneous in Part.

An ambiguous or incorrect portion of the charge to the jury will not be held for reversible error on appeal, when the charge, construed as a whole, and in its connected parts, correctly states the law controlling the case.

INDICTMENT for secret assault. Appeal by defendant from *Bond, J.,* at October Term, 1920, of PAMLICO. Defendant was convicted of an assault with a deadly weapon. Judgment on verdict, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

C. L. Abernathy, H. A. Tolston, Jesse Davis, George Willis, F. C. Brinson, Z. V. Rawls, Ward & Ward for the defendant.

HOKE, J. It is chiefly urged for error by appellant that the court refused to enter judgment of nonsuit, but on the record the objection cannot be sustained. Accepting the testimony tending to establish defendant's guilt as true, the established rule on motions of this character, it appears that on the evening of 14 November, 1918, at 7:30 p. m., the prosecutor, L. T. Daniels, was sitting at a table in a front room of his house when he was shot through the window by some person then unknown and unobserved, standing in front of the house, the charge being Nos. 6 and 8 birdshot, nineteen of the shot taking effect in his head; that next morning, about 6:30 a. m., two English bloodhounds were brought to the place by the owner, W. A. Harmon, and put on the apparent track of the person who did the shooting, and followed the trail down the intervening roads to defendant's house, one of the dogs whining up at the cart where defendant was then sitting just about to leave on some business, one witness saying that one of the dogs reared up on the cart and another that they followed same to the gate as defendant drove off, and being then stopped, and after defendant left the house the dogs went through the yard and up to a hog pen where it was shown defendant had been that morning; that defendant made no protest or comment on the presence of the crowd who had come to his house or to the action of the dogs, but after taking $1.50 paid him by one of the crowd, he drove off without further remark. It was shown that as the dogs pursued the trail they once or twice left the trail to go into a nearby yard, but always returned to it till they carried it to the yard of defendant as stated. There was evidence to the effect that the dogs were English bloodhounds who were trained and accustomed to follow the human track and had been found reliable in their work. That out in the yard or near it, and not far from the window at a point or in the direction where one must have stood to shoot into the house, the grass appeared to be trodden down, and near it were some gun shells, and just over the fence and in a line towards the window was a wad from a gun discharge. There was also evidence of the State tending to show that the year before defendant had paid plaintiff $500 to be relieved from a land trade in which they had entered, and when prosecutor afterwards sold the land for same price to others, defendant had made demand for a return of the $500, or part of it, and from time to time had persisted in this demand on plaintiff. It was shown further that the gun of defendant, when examined on the morning the dogs went to the house, showed that one barrel had been recently fired, and that on Saturday before the shooting defendant had endeavored to procure the gun of a neighbor, but failed. It appeared, also, that the owner of the dogs, who had charge of them on the occasion, was not aware that defendant was in any way suspected, or of the existence of any grudge between them. Defendant, on the witness stand, testified and claimed that the effort to procure the gun of a neighbor was because he desired a gun of smaller barrel to hunt birds with; also that he had been hunting birds the Saturday before and had left two dead birds in his bag which had spoiled, causing an odor when he threw them out, the State contending that this was an effort to weaken the impression caused by the action of the dogs in his yard, and was a circumstance in support of its claim of guilt.

In *S. v. McIver,* 176 N. C., 718, it was stated as the correct summary of our decisions on the admission in evidence of the action of bloodhounds, that their action constitutes and is properly receivable in evidence when it is shown that they have been accustomed and trained to pursue the human track, have been found by experience reliable in such cases, and further that in the particular instance they were put on the trail of the guilty party and have pursued and followed it under such circumstances and in such a way as to afford substantial assurance or permit a reasonable inference of identification, citing, among other authorities, *S. v. Wiggins,* 171 N. C., 814; *S. v. Norman,* 153 N. C., 591; *S. v. Freeman,* 146 N. C., 615; *S. v. Moore,* 129 N. C., 501; *S. v. Dickinson,* 77 Ohio St., 34; and so stated, the position has been fully approved in the later case of *S. v. Yearwood,* 178 N. C., 813.

In the present instance these dogs and their action in the premises seem to meet every requirement embodied and approved in these and other cases on the subject, and supported as it is by the existence of a grudge between the parties, the condition of defendant's gun the morning after the shooting, and his unusual conduct in leaving his home the morning after with the dogs and crowd there in his yard, without comment or protest, and his evident effort to account for the action of the dogs in whining up at him in his wagon affords sufficient evidence of guilt and fully upholds the action of the court in submitting the issue to the jury. True, defendant, a witness in his own behalf, denies absolutely that he shot the prosecutor, and both he and his wife testify that he was at home on the occasion, some distance away, and there is some evidence *ultra* in support of their statement and claim, but this testimony coming from defendant may not be considered, and has no bearing on the legal proposition involved in defendant's motion to nonsuit, and which, as stated, must be decided on the State's testimony, and on the supposition that same is true.

Defendant excepts further to a portion of the charge in which his Honor said to the jury: "If the State, by the greater weight or preponderance of the evidence, has shown to you the guilt of the defendant, you should find him guilty beyond a reasonable doubt." In reference to the trial of causes before the jury, this Court has repeatedly given approval to the position that "the charge of a trial judge must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If when so construed it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." *S. v. Exum,* 138 N. C., 599-602. While this excerpt, if it stood alone, might be objectionable, it does not stand alone. Immediately before and as a part of the same clause, the court had instructed the jury in definite terms that "The burden is on the State to show beyond a reasonable doubt the guilt of the defendant." And in twelve or fourteen other parts of the charge the court, in direct terms or by express recognition, instructed the jury that "in order to a conviction the guilt of defendant must be established beyond a reasonable doubt." The excerpt objected to is in itself ambiguous, and if not a mistake of the stenographer is so clearly an inadvertence on the part of his Honor that the jury could not possibly have been misled as to the degree of proof required, and applying the wholesome principle to which we have adverted, and considering the charge as a whole, we are well assured that the guilt of defendant has been established under correct principles of law, and on authority the exception should be disallowed. *S. v. Baldwin,* 178 N. C., 693.

The remaining exceptions are without merit, and on careful consideration of the entire record, we are of opinion that the trial is free from reversible error, and the judgment of the court should be affirmed.

No error.

STATE v. HARRY CALDWELL, ALIAS HARRY CHAPLAN, ALIAS HENRY WILLIAMS, JESSE FOSTER, FRANK WILLIAMS, GEORGE PEARSALL, JIM HILL.

(Filed 9 March, 1921.)

1. New Trials—Homicide—Criminal Law—Mob Violence—Appeal and Error.

The principle that a new trial will be granted in a criminal action where the conduct of a lawless mob, hostile to the prisoner, had direct bearing on the immediate conduct of the trial, and was of a kind or character intended and well calculated to distract the jury from intelligent, calm, and impartial consideration of the issues involved, has no application when, as under the facts of this case, it is made to appear that the cause was impartially heard and determined in a seeming and well-ordered manner, entirely unaffected by the futile action of the lawless element endeavoring to break into the jail and lynch the several defendants under indictment for murder in the first degree, and giving every assurance that the rights of the defendants, and each of them, were given full consideration.

2. **Trials—Criminal Law—Severance—Court's Discretion.**

In criminal cases, as in this one, a trial of several defendants for the same homicide, it is within the sound discretion of the trial judge to permit or refuse defendants' motion for a severance, and it will not be reviewed in the absence of patent and gross abuse.

3. **Trials—Evidence—Infants—Court's Discretion—Appeal and Error.**

Objection to the admission in evidence of the 11-year-old son of the deceased, on account of his youth and incapacity, etc., upon the trial of homicide, is to the sound legal discretion of the trial judge, which is not reviewable on appeal in the absence of patent or gross abuse.

4. **Appeal and Error—Objections and Exceptions—Unanswered Questions.**

Exceptions to the rejection from the evidence of unanswered questions will not be considered on appeal when the answers thereto are not made to appear.

5. **Jury—Evidence—Jury Room—Documents, Etc.—Trials.**

The jury must determine the cause before them on the evidence as it is heard by them or as presented in open court, unless by consent and in certain restricted instances allowed by statute, and, as a matter of right of a party, the jury is not allowed to take with them documentary or other written evidence for their private inspection.

INDICTMENT for murder of Herman Jones, tried before *Devin, J.*, at November Term, 1920, of WAYNE.

The facts in evidence on the part of the State tended to show: that in the latter part of November, seemingly Sunday the 21st, defendants were in the car of defendant Foster, and between 4 and 5 o'clock p. m. went to the store of deceased, four miles east of Goldsboro, N. C., and were seen standing about the gas tank buying a small amount of gasoline; that this was paid for by defendant Caldwell, handing to Jones a twenty-dollar bill; and that in making the charge Jones displayed a large roll of money, which he took from his pocket; that when this gasoline was bought and paid for, all of defendants were standing around the gas tank and could see the money shown by deceased; that on the same night, between 7 and 8 o'clock, when Jones and his wife and three of their children, a colored boy who helped about the house, and a white boy who was crippled and had to move with crutches, were sitting in a front room of the Jones residence, which was a short distance from the store, these five defendants in the car drove past the house into the back yard, and came up on the back porch; that defendant Foster came into the room where Jones and the family, etc., were and told deceased that some one out there wished to see him, and Foster then shook hands with the colored boy and engaged him in conversation; that Jones went out and down the hallway towards the back door, there being at the time a lighted lamp in the hall, and when he had gotten near the back door and about opposite or just beyond the dining-room door, some one of the party, shown to be defendant Caldwell, called to him, "Throw up your hands," and almost immediately fired the pistol, inflicting a mortal wound from which he died in about thirty minutes after he was shot. Mrs. Jones, wife of the deceased, said that all she heard was "Throw up your hands." The colored boy testified the call was, "Throw up your hands or I will kill you!" When the shot fired, Jesse Foster went out and towards the back door, where the party had entered, and they all ran off. The colored boy, the helper, went out that way in the endeavor to see who they were, and the cripple had also fled from the room, probably going out the front door, the theory of the State being that the flight of defendants was caused by the unexpected appearance of the additional members of the household. Only three of the Jones children were present, the eldest of the three, being eight, their oldest child, aged eleven, spending the night with his grandparents.

The course and effect of the bullet tended to confirm the State's evidence that the person who did the shooting was standing in the hall at the time and not very far in the back door.

The defendants were not examined as witnesses in the trial, but without objection their statements taken at coroner's inquest were put in evidence and read to the jury, these statements tending to show that defendants had gone to the house for the purpose of getting whiskey, and were in the dining-room, where Jones had brought the whiskey, and while they were in there the defendant Caldwell, who claimed to be a detective, drew his pistol, saying, "You are all under arrest." That all of them threw up their hands except Jones, and he making some move towards his pocket as if for a weapon, Caldwell fired and killed him. No authority or justification for this claim of being an official on the part of Caldwell was shown in evidence.

Under a clear and comprehensive charge from the court presenting every phase of the case, and permissible defenses arising on the testimony, the jury rendered a verdict of guilty of murder in the first degree against defendants Caldwell and Foster, and of murder in the second degree against the other three defendants. Judgment in accordance with the verdict, and defendants excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. A. Humphrey and Hood & Hood for Hill and Pearsall.

W. S. O'B. Robinson for Foster and Williams.

N. D. White for Harry Caldwell.

HOKE, J. It is chiefly objected to the validity of this conviction that by reason of the action of a lawless mob, and its hostile demonstrations towards them, the defendants were deprived of that fair and impartial trial guaranteed them by the Constitution and laws of the State, but on the record the exception must be overruled. As this is the principal objection insisted on for the defendants, and the occurrence and attendant circumstances at the time and after aroused very great interest and extended comment, we consider it not amiss to incorporate the findings of the trial judge concerning them, which have been duly stated and made a part of the record, in terms as follows:

"The court deeming it proper that a more extended record than is shown upon the minutes of the court should be made of the happenings in relation to the trial of the case of Harry Caldwell and others at the November term of Wayne Superior Court, desires to file the following statement:

"Harry Caldwell and four other prisoners were under indictment for murder in the above entitled case at said court, and were being held for safekeeping in the State's Prison at Raleigh. The sheriff was ordered to bring these prisoners to Goldsboro on the evening of 1 December for trial, which had been set for the following morning. In attempting to carry out this order, and before he could get them to Goldsboro, the sheriff was prevented by a large mob, who sought to lynch the prisoners, and it was only by the courage and skill of the sheriff and his assistants that he succeeded in eluding the mob and returning his prisoners to Raleigh.

"The matter having been brought to the attention of the judge, after consulting with Solicitor W. D. Siler and members of the bar and representative citizens of the county, and being assured that the citizens of Goldsboro and Wayne County would give the court and the officials all the aid in their power to preserve order, and would be willing to render personal service to this end if called upon, the court ordered the prisoners to be at once brought to Goldsboro for trial. Fifty citizens were therefore called upon and sworn in as special officers of the court. This number included every member of the Goldsboro bar, except those engaged in the trial of the case, and many of the most prominent business and professional men of the city.

"These special officers and the sheriff brought the prisoners into court 2 December, and the trial proceeded orderly in the prescribed form and continued until the usual time for adjournment for the evening was reached, when recess was taken until 9:30 a. m., 3 December.

"During the evening recess of the court, the officers being advised that an effort might be made during the night to take the prisoners from them and lynch them, decided they could be better protected in case of attack in the jury retiring rooms on the third floor of the courthouse than in jail. The jury had been, upon adjournment, sent to rooms up town two blocks away. Those special officers then repaired with their prisoners to the third floor of the courthouse, and being fully armed, so disposed themselves as to effectively cover the only approach to their position. Under the leadership of George C. Freeman (lately Lt. Col., 30th Div., A. E. F.) the special officers were divided into squads and assigned to various duties within and without the courthouse.

"A large crowd surrounded the court square, and much excitement prevailed. This crowd was composed of some lawless elements, but also of many good citizens there from curiosity, and some to help discourage an attack. About 9:15 p. m., a roughly organized mob of several hundred men, armed and masked, declaring their purpose to lynch the prisoners, made an attack upon the west front of the courthouse, accompanied by a number of pistol and gun shots directed at the building and occupants. The glass in the windows and doors was broken, and the woodwork about the doors on that side injured. The lock of the door was unbroken, however, and those of the special force on that floor refusing to open, the firing from the outside continued until one who appeared to be the leader of the mob was severely wounded by a pistol shot and fell. After this person was carried away, the remainder of the mob retired. There were no casualties among the defenders, and no member of the mob set foot within the courthouse. Thereafter no determined attack was made upon the building, but a large crowd, some angry and threatening, continued to surround the square, and there were occasional firings of pistols during the night.

"The judge, hearing of the attack on the courthouse and its result, and being advised of rumors of other mobs forming and of threats that dynamite might be used, deemed it wise to call upon the Governor for military assistance to relieve the defenders of the prisoners, and in order to be prepared for possible emergencies. The Governor thereupon ordered out a company of riflemen from Burlington and a machine gun company from Durham, under command of Captain Towler. These, however, did not arrive until about 7 a. m., 3 December. At this time the disorder had entirely ceased, but the military companies were useful in relieving the special officers in charge of the prisoners and in assisting the sheriff in policing the courthouse grounds.

"At 9:30 a. m., 3 December, the jury was brought back to the courthouse, the prisoners brought in, and in the presence of a large, orderly crowd, including many ladies, the trial proceeded regularly to its conclusion. The case was fully argued by counsel for the State and for the prisoners, and the jury, after deliberating for more than three hours, at 9:30 p. m., rendered the verdict which appears on record, two of the prisoners being convicted of murder in the first degree and three of murder in the second degree. The prisoners were sentenced and taken at once to the State's Prison by the sheriff, accompanied by the military companies. The behavior of the officers and of the military companies was exemplary, and their presence reassuring to the people.

"In conclusion, I desire to submit these observations:

"Undeniably the action of the mob constituted an attack upon organized society in the administration of public justice, and was entirely without justification or excuse, and was an attempt to violently interfere with the lawful procedure of the court, but its outcome showed unmistakably that the forces for law and order in Wayne County are stronger than the opposing elements, and that the courts have the power to protect themselves by calling to their aid the influence and active support of good citizens. A forward step has been made by the citizens of Wayne County in controlling the mob spirit which constitutes one of the hindrances to the development of our State.

"The trial of those prisoners would never have been attempted had not the judge felt that he could with confidence rely upon the willingness and the ability of the citizens of Goldsboro and Wayne County to prevent a violation of the integrity of a court, and the trial, once begun, it was determined, with this aid, to carry it to a lawful and orderly conclusion in spite of the efforts of the ignorant and the lawless to the contrary. The event shows this confidence was not misplaced. And while I regret the injury and damage to the courthouse building, and the wounding of a citizen, I believe the outcome one of distinct value to the county and to the State in its demonstration of the power of the forces in favor of law and order when properly called into action. For this was a case of Wayne County citizens, unaided by outside force, and prompted only by a sense of public duty, standing manfully against, and at the imminent risk of their lives, subduing attacks delivered by unruly elements of Wayne County citizenship, and doing so under circumstances calling forth courage, endurance, and determination. The unselfish public service rendered by those who served as special officers deserves praise, and is to each one an honorable distinction. They do not ask for compensation, but they have an abundant recompense in the approval of their own consciences and in the gratitude of every law-abiding citizen. The court desires to give public and permanent expression to his personal thanks to each one of them.

"I desire to call attention to the names of those who held the third floor of the courthouse during the whole night, and kept the prisoners for the court: George K. Freeman, M. H. Allen, M. T. Dickinson, Lewis and Roy Giddens, John R. Edwards, Kirby Boyette, Doc Dewey, Lawrence Bradsher, Harvey Holmes, Edward R. Michaux, Hugh Dortch, Charles A. Thompson, Jake P. Shrago, George C. Royall, Jr.

"These men chose their position well and strengthened it skillfully. Heavily armed and supplied, they awaited attack with calmness. They were determined to maintain their defense at all hazards, in the performance of a public duty as to which they had no personal interest. They were unconquerable and unafraid. Such spirit should be a source of pride to the citizens of Wayne, and to every North Carolinian. With such spirit as this, our country is safe from attack either from foes without or lawlessness within.

"The following are the names of the sheriff and his assistants who aided the court in these events: William S. Grant, sheriff; deputies, Paul Best, J. C. Rhodes, Walter Grant, Lester Hunt, Thad Howell, and J. H. Howell. The court desires to commend the high courage and faithfulness of Sheriff Grant, and of these assistants, who were not only courageous but wholly devoted to obedience to the orders of the court, and to the suppression of lawlessness.

"The court desires to call attention to and commend the action of many influential citizens, including Judge W. R. Allen, Judge O. H. Allen, Messrs. George Royall, R. H. Edwards, J. D. Langston, and others, who were active in counselling and advising against violence.

"To these forces is due the victory. They have contributed notably to strengthening the confidence of the people in the power of the courts, and to the discouraging of mob violence and lynch law in North Carolina. W. A. DEVIN, *Judge.*"

From this statement it fully and satisfactorily appears that while the mob, at the commencement and just before the trial, showed a determination to lynch the defendants, yet by the instant and courageous action of the officials and law-abiding citizens of the community this mob was suppressed, and the influence and effect of its conduct entirely removed and effaced, and the trial proceeded with that calmness and deliberation so essential to the administration of well-ordered justice. And in addition to the commendation deservedly expressed by the presiding judge in reference to the conduct of the good citizens of Goldsboro and Wayne

County, we consider it proper that we express like commendation of the upright and able judge who demeaned himself throughout with a firmness, wisdom, and impartiality in every way worthy of the best traditions of his great office.

In the authorities cited and chiefly relied upon by the defendants, *S. v. Wilcox,* 131 N. C., 707; *S. v. Weldon, S. c.,* Annotated Cases, 1913 E, p. 801; *People v. Fleming,* Annotated Cases, 1915 B, p. 881, the conduct objected to necessarily had direct bearing on the immediate conduct of the trial, and was of a kind and character intended and well calculated to distract the jury from an intelligent, calm, and impartial consideration of the issues involved, but not so here, where the cause was heard in a seemly and well-ordered manner, entirely unaffected by the futile action of the lawless element, and giving every assurance that the rights of defendants, and each of them, were given full consideration, a position that finds full support, if any were needed, in the fact that the jury took time in their deliberations and showed discrimination in their verdict, imposing the supreme penalty only on the two leaders who were most active participants in the offense.

The other exceptions of the defendants are without merit. On the objection that the judge denied defendants' motion for severance, the Court has repeately held that the question rests on the sound discretion of the trial judge, and will not be reviewed except in case of patent and gross abuse. *S. v. Southerland,* 178 N. C., 676. And as to the ruling of his Honor in permitting the 11-year-old son of the deceased to be sworn and testify, on account of his youth and incapacity, etc., this, too, is in the discretion of the judge, *S. v. Finger,* 131 N. C., 781, and the answers of the witness on the *voir dire,* and also the directness and intelligence of his testimony, show that in this instance the discretion of the court has been providently exercised.

Another exception was to the refusal of the court to permit the sheriff when examined as a witness to make answer to a series of questions propounded by defendants as to whether deceased had the general reputation of being a whiskey seller. There is doubt on the facts of the record if an affirmative answer to the proposed question would be of sufficient significance to disturb the results of the trial, but the exception is clearly untenable for the reason that it does not appear what answer the witness would have made to the proposed question. The exception, therefore, must be disallowed.

Defendants except further that the judge, on objection, declined to allow the jury to take with them to the jury room the statements of defendants, made before the coroner, and which had been introduced in evidence, but this ruling also is in accord with our decisions on the subject, that unless by consent and in certain restricted instances allowed by statute, the jury must determine the cause on the evidence as it is heard by them, or as presented in open court, and is not allowed to take with them documentary or other evidence for their private inspection. *Nicholson v. Lumber Co.*, 156 N. C., 59-68, citing *Williams v. Thomas,* 78 N. C., 47; *Watson v. Davis,* 52 N. C., 178-81; *Outlaw v. Hurdle,* 46 N. C., 150.

On careful examination of the entire record we are of opinion that defendants have had the benefit of a fair and impartial trial, in which their every right has been duly considered and respected, and that no error has been made to appear that gives them any just and legal ground of complaint.

No error.

STATE v. GEORGE HALL.

(Filed 30 March, 1921.)

1. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

An objection of a party to an action that the trial judge did not state his contentions with sufficient fullness to the jury, while the contentions of the other party were fully given, should be made in time to afford the judge an opportunity to supply any omission, or it will not be considered on appeal.

2. **Verdict—Impeachment—Evidence.**

Evidence to impeach and set aside a verdict of a jury must be shown by other evidence than that of the jurors, or any of them, to be considered on appeal. As to the power of the court to set aside a verdict for cause after adjournment, see *S. v. Kinsauls*, 126 N. C., 1095, and other cases cited in the opinion.

3. **Same—Appeal and Error—Findings.**

The trial judge should find the facts upon which he refuses to set aside a verdict for cause, on appellant's motion, or it will not be considered on appeal.

4. **Jurors—Verdict—Evidence—Compromise—Personal Consideration.**

Jurors on a trial for a criminal offense are required to form their opinion of the guilt or innocence of the defendant from the evidence, and it is gross wrong in them to agree to the verdict rendered, with a recommendation for mercy, based upon consideration of personal inconvenience, and thus compromise with the other jurors.

APPEAL by defendant from *Daniels, J.*, at January Term, 1921, of CUMBERLAND.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. C. Downing, McCormick & Clark, and Robinson & Robinson for defendant.

WALKER, J. The defendant was convicted of a secret assault, and from the judgment upon such conviction he appealed to this Court, and assigns several errors.

1. That his contentions were not stated, though the State's were given in full. This exception is not supported by the record, which shows that the contentions of both sides were stated by his Honor with fairness and impartiality. Besides, the objection, or rather suggestion, came too late. We have often held that such an objection must be made in apt time so that the court may have opportunity to supply any omission. The proceedings of the court must be conducted in an orderly manner, and, of course, all objections should be made at the proper time, and especially an objection of the kind here made. The latest case on the subject is *McMahan v. Spruce Co.*, 180 N. C., 636, where other authorities are cited. It is there held that an exception to the manner of stating contentions of the parties must be brought to the attention of the court by action taken promptly, and for the obvious purpose of having the omission, if there is one, corrected by the presiding judge at the time. There was no proper request to correct this oversight, if there was any, in the respect indicated.

2. The contention as to the absence of a motive for the assault was stated to the jury in such a way that they must have understood it. The State contended that there was a motive for committing the assault, and the defendant denied that there was any such motive, or any evidence of one, and the judge explained these contentions *pro* and *con* to the jury, stating both phases of it, and certainly allowed neither side any advantage in the statement. The jury could not well have misapprehended the court, and the defendant's rights were fully protected. He therefore suffered no harm.

3. The power of the court to set aside a verdict for cause after the adjournment is discussed in *S. v. Alphin*, 81 N. C., 566; *S. v. Bennett*, 93 N. C., 503; *S. v. Kinsauls*, 126 N. C., 1095. But we need not refer to this feature of the case any further and will assume, for the sake of argument, that we have possession of the cause sufficiently to grant relief if the appellant is entitled to any, and we think he is not. He seeks to set aside the verdict because of misbehavior of the jury, and proposes to impeach their verdict by their own affidavits. This is not allowable, as we have repeatedly decided in former cases, and his Honor, Judge

Daniels, so held, and was, of course, right in so deciding. *Justice Bynum* said, in *S. v. Smallwood,* 78 N. C., 560: "Misconduct on the part of the jury, to impeach their verdict must be shown by other testimony than their own. This has been long settled, and for the most convincing reasons, which will readily suggest themselves to all minds at all familiar with the administration of justice through the medium of trial by jury." Citing *S. v. McLeod,* 8 N. C., 344, where *Judge Henderson* said: "As to the misconduct of the jury, it has been long settled, and very properly, that evidence impeaching their verdict must not come from the jury, but must be shown by other testimony. We can, therefore, perceive no grounds for a new trial." In *S. v. Best,* 111 N. C., 638, much like this one, *Justice MacRae* stated the rule very strongly when he said: "To meet the earnest contention of the prisoner's counsel that the presiding judge, having permitted the affidavits to be filed, ought to have found the facts and spread them upon the record, it appears that the affidavit offered alleged, or was intended to allege, that the affiants had agreed to the verdict of guilty through mistake in their understanding of the effect of the verdict. In this event, as has been said above, the Supreme Court cannot correct errors committed by a jury; this is the province of the judge below, and therefore it was unnecessary for his Honor to find the facts upon the affidavits. But it might well be held that the affidavit, if we were at liberty to consider it, alleges misconduct upon the part of the five jurors making it, for if they were not satisfied by the evidence of the guilt of the prisoner, it was a gross wrong in them, for any consideration of personal inconvenience, to compromise with the other members of the jury and agree to a verdict of guilty, with a recommendation to mercy, in the hope that the life of the prisoner would be spared at the cost of a long imprisonment. If they were not satisfied of the prisoner's guilt, the only verdict they could conscientiously render would have been one of not guilty. And if the ground of the motion was the misconduct of the jurors, it should, as we have seen, have been based upon other testimony than the affidavits of the jurors who alleged their own misconduct, for they cannot be heard, and no facts could be found by the judge below upon their affidavit." And again: "We find ourselves concluded by the authority of an established and long-settled rule based upon the wisest reasons of public policy, that a juror should not be permitted to impeach his own conduct in the rendition of a verdict. The result of a departure from the old rule would unsettle other important principles, protract litigation, and weaken the public regard for the ancient and well-tried methods of trial by jury." It was deemed necessary to discuss this matter somewhat at length, with a citation of a few leading cases, in order to prevent inferences from some of the general language used in *S. v. Fuller,* 114 N. C., 885, which we think are unwarranted, but which may lead to confusion and a correct understanding of the law in cases belonging to same class as this one. It would lead to very grave consequences if we should permit jurors to impeach their own verdict. It would render judicial trials unstable and soon undermine public confidence in the integrity of our courts and the justice of their decisions. In this respect, at least, we had better take heed of the ancient landmarks and follow the precedents so firmly established by those who have gone before us. The rule should be especially applicable to this case where the only witness upon whose testimony the State could possibly, or safely, rely is dead, and any decision must necessarily rest upon the impeachment of jurors alone. But it appears that what the jurors did has worked no substantial harm to the defendant. Language of the presiding judge much stronger and more emphatic than that which the jurors here supposed the judge had used, but which he did not use, was held by this Court, in a former case, not to impair the verdict. *Osborne v. Wilkes,* 108 N. C., 651. But the decisive test is that some of the jurors are attempting to impeach their own verdict, and to state the mental process by which they reached their verdict.

No error.

PER CURIAM. The petition for a *certiorari* in this case is denied for the reason set forth in the opinion in this case on the merits.

Denied.

STATE v. G. V. MILLS.

(Filed 6 April, 1921.)

1. **Criminal Law—Automobiles—Statutes—Reckless Driving.**

Where a statute makes it a misdemeanor for careless or reckless driving of automobiles on public highways with regard to the width of the highway, or traffic thereon, and to the danger of life, limb, or property of persons thereon, and by proviso fixing varying speed limits for automobiles outside of and within incorporated cities or towns, making the violation of speed limits negligence *per se*, the legislative placing of these limits does not exclude a conviction for violating the preceding provisions of the statute at a less speed. C. S., 2618.

2. **Criminal Law—Indictment—Separate Offenses—Courts.**

An act defining separately the reckless or careless driving of automobiles upon public highways, with reference to the streets in residential and business portions of incorporated cities and towns, and on the public highway outside of them, making a violation thereof a misdemeanor, states several offenses each of which is a separate crime, independent of the other.

3. Pleadings—Criminal Law—Statutes—Amendments.

On appeal from a court of a justice of the peace, the Superior Court judge may, under our statute, C. S., 1500, Rule 12, liberally allow amendments in his discretion, to the substance of a criminal complaint, as well as to the form, when so doing does not change the character of the offense originally charged.

4. Same—Separate Counts—Same Offense.

Where the defendant has been separately tried before a justice of the peace for the several acts made indictable under C. S., 2618, as to unlawful speeding upon public highways and streets, it is permissible for the Superior Court, on appeal, to allow an amendment to the complaint or warrant so as to make one complaint include the several offenses under different counts. C. S., 4647.

5. Criminal Law—Indictment—Several Counts—Verdict.

Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. C. S., 4622.

6. Courts—Jurisdiction—Recorder's Court—Justices of the Peace—Statutes—Concurrent Jurisdiction.

A recorder's court given concurrent jurisdiction with the court of a justice of the peace within the county had jurisdiction in this case over the offense of reckless driving, made a criminal act by C. S., 2618.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1920, of NASH.

Defendant was charged, before the recorder's court of Nash County, with "unlawfully, willfully, and feloniously driving an automobile recklessly, carelessly, and faster than allowed by law, and committing an assault and battery while so doing upon J. R. Wheless and others, with intent to kill, injure, and maim and damage said J. R. Wheless, contrary to the form of the statute," etc. He was tried upon the charge before the recorder's court and convicted and sentenced to six months imprisonment, and assigned to work on the public roads, and he appealed. The law alleged to have been violated is sec. 2618 of the Consolidated Statutes. The statute creates several different offenses as to driving motor vehicles on the public highways of the State; that is, driving recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person. The proviso is, that operating a motor vehicle at a rate of speed exceeding twenty-five miles per hour on any public highway outside the limits of any incorporated city or town, or at a rate exceeding eighteen miles per hour in the residential portion of any city, or at a rate exceeding ten miles per hour in the business section, shall be a violation of the statute.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. M. Person for defendant.

WALKER, J., after stating the case: The proviso was intended to define three acts which should *per se* constitute reckless or careless driving, and the commission of each of these acts is a separate and distinct crime. There may be other acts of reckless or careless driving within the meaning of all that goes before the proviso, as it was not the purpose of the Legislature to restrict reckless or careless driving to those acts enumerated in the first proviso of sec. 2618. A person may drive carelessly, or even recklessly, without exceeding the prescribed speed limits, and this case furnishes a clear illustration of it.

Now as to the power of amendment. It will be observed that in the original affidavit upon which the warrant was issued by the recorder, defendant was charged with reckless and careless driving, and with driving faster than is allowed by law, and also with the commission of an assault. The defendant appealed from the sentence of six months in prison, and in the Superior Court the presiding judge was requested to allow an amendment of the affidavit, and of the warrant which refers to it, so that the charge might be made with greater certainty and particularity and the defendant was thereby informed of the special accusation made against him. We do not see why he should complain of this, as it favored him, because it enabled him to make better preparation for his defense. But whether so or not, the statute gives the judge ample power to permit such amendments to be made. Its terms are very broad and inclusive, as will appear on its face. This is the law, it being in Consolidated Statutes of 1919, sec. 1500, Rule 12 (Revisal of 1905, sec. 1467, Rule 11), and reads as follows: "No process or other proceedings begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment." In the note to sec. 1500 (Rule 12) of Consolidated Statutes will be found the cases in which the exercise of the power in a very liberal manner has been upheld. It was contended that under this section the court has no power to strike out the offense charged in the lower court and insert an entirely new and different one. *S. v. Taylor,* 118 N. C., 1262; *S. v. Vaughan,* 91 N. C., 532; *S. v. Crook, ib.,* 536. The reason for the change in the statute extending the power of amendment, so as to embrace both civil and criminal cases, matters of substance as well as matters of form, and the power to amend before or after judgment, is perfectly obvious. It was because a justice of the peace was supposed to lack technical learning and skill in framing process and pleadings, whereas the lawyer who practiced in the Superior Courts, and the solicitor, were supposed to have both, and also the judge, and no harm could be done to the defendant, or to the opposite party, by making the process or pleading conform, in some degree, to the rules of law. It produced, at least, greater certainty in legal procedure. No party could be prejudiced by it unless there was a departure from the original charge in the warrant. A clear analysis of this section (which was sec. 908 of the Code) is made by *Justice Ashe* in *S. v. Vaughan, supra,* showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions. Rev. Code, ch. 52, sec. 22; ch. 3; and the Code, sec. 908.

Applying these well settled principles to this case, we find that the original warrant, while somewhat informal in its allegations, embraced, in a general way, all that is charged in the amendment allowed by the judge, in the form of a bill of indictment, each count specifying a distinct and different offense, but all embracing an assault, reckless driving, and driving at an excessive speed or a speed prohibited by the law. We should construe the original warrant with some liberality rather than with technical rigidity, and if the meaning of the law is there, it may be amended to express it more clearly in the appellate court, where the trial is anew. C. S., 4647. The charges here are for reckless driving and overspeeding in the three several respects mentioned in the statute. Defendant was acquitted of the assault and properly convicted of the three acts of driving at an unlawful rate of speed. The latter were committed on three different occasions and at three different places on the public highway and on the streets of Spring Hope, defendant driving more than 18 miles in its residential and more than 10 miles in its business section. They were therefore separate and distinct crimes. On the question of the power to amend the warrant, and the duty of the court to pursue a liberal policy with respect thereto, the following cases are pertinent: *S. v. Cauble,* 70 N. C., 62; *S. v. Smith,* 103 N. C., 410; *S. v. Baker,* 106 N. C., 758; *S. v. Yellowday,* 152 N. C., 793; *S. v. Currie,* 161 N. C., 276; *S. v. Poythress*, 174 N. C., 809; *S. v. Price*, 175 N. C., 804; *S. v. Gillikin*, 114 N. C., 832; *S. v. Telfair*, 130 N. C., 645; *Stone v. R. R.*, 144 N. C., 220. The later cases, *S. v. Hyman*, 164 N. C., 411; *S. v. Publishing Co.*, 179 N. C., 720. The warrant in this case is quite as amenable, under the provisions of C. S., 1500, Rule 12, as were the warrants in any of the cases just cited. The right to join the counts in one warrant is specially given, and the offenses are all of the same general class. C. S., 4622. Each count is in fact and theory a separate indictment, and a general verdict of guilty applies to each and every count. *S. v. Toole*, 106 N. C., 736. But here the jury has given, not a general verdict, but a separate verdict on each count. The punishment was properly imposed, and each sentence could be made to begin at the expiration of a preceding one. *S. v. Hamby*, 126 N. C., 1066; *S. v. Cathey*, 170 N. C., 794; *In re Black*, 162 N. C., 458. The defendant contends, though, that only one offense was committed, but we cannot accede to this proposition, as it is untenable if the evidence is to be accepted as true. Each of the three acts denounced by the statutes, driving at a rate of speed exceeding 25 miles, 18 miles, and 10 miles in the three several places mentioned constitutes a separate case of careless or reckless driving, the latter being but an intensive expression of the former, meaning rashly, negligent, or utterly careless, as if heedless, or as if indifferent to or regardless of consequences. As we have said, a person may drive carelessly, or even recklessly or heedlessly, without necessarily driving with excessive speed, though if he does overpass the speed limit, he violates the statutes by its express terms. Each of these offenses relating to speed have different elements, and it would be physically impossible to commit all of them at one and the same time, or at one and the same place, because they refer to different localities, which are separated from each other. Defendant could not be in two places at one and the same time, and certainly not in three. He might drive at an excessive speed, over 25 miles per hour, on a public highway in the country for only a half mile, and at all other times he may keep his motor car within the speed limit, and yet he would violate the law, and the same would equally apply to a street in the residential or business section of a town, using only a part of the street for the unlawful purpose, and his act would likewise be a violation of the statute. So that there were three violations in this instance.

The motion to quash was properly overruled, as the statute cited allows a joinder of the counts upon which he was convicted. C. S., 4622 (Laws 1917, ch. 168). As to the jurisdiction: The recorder's court in Nash County has concurrent jurisdiction with justices of the peace of offenses within the jurisdiction of such justices, and also jurisdiction of other offenses which are made petty misdemeanors. Public-Local Laws 1911, ch. 176. The recorder's court had jurisdiction, then, of the offenses charged in the warrant, and also of those alleged in the Superior Court, by way of amendment. If there was no local statute, the general statute concerning recorder's courts would sustain the jurisdiction.

Reviewing the entire case, and record, we find that no error was committed by the judge at the trial.

No error.

STATE v. DAVID ROUNTREE.

(Filed 6 April, 1921.)

1. **Evidence—Nonsuit—Trials.**

Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses.

2. **Criminal Negligence—Statutes.**

Where one is tried for the reckless driving of an automobile made criminal by our statute (C. S., 2618), and an unintentional killing has been established by him, evidence is sufficient for conviction of manslaughter which tends to show such recklessness or carelessness as is incompatible with a proper regard for human life or limb, or that such injury was likely to occur under the circumstances.

3. **Same—Manslaughter.**

The commission of a dangerous act, in itself a violation of a statute, intended to prevent injury to the person, when death to another ensues renders the actor guilty of manslaughter at least.

4. **Automobiles— Statutes— Criminal Negligence— Evidence—Nonsuit—Questions for Jury.**

Evidence tending to show that the deceased was in a place of safety many feet beyond the well defined line of a public highway, and that without any apparent reason the defendant ran his automobile therefrom a considerable distance, with a clear and unobstructed view, and without turning aside to avoid the impact ran over and killed the deceased, is sufficient to take the case to the jury upon the question of the defendant's culpable negligence, and sustain a verdict of guilty of manslaughter under the provisions of C. S., 2618.

5. **Criminal Negligence—Statutes—Speed Limits.**

Where an act makes reckless driving of automobiles upon the public highways, under certain conditions, a criminal offense, and there is a proviso fixing various speed limits thereon as to different localities and conditions criminal negligence *per se* and indictable, the proviso as to the speed limits does not necessarily preclude conviction of the offense prescribed in the body of the act for recklessness while driving at less speed.

APPEAL by defendant from *Horton, J.,* at November Term, 1920, of CUMBERLAND.

Criminal prosecution, tried upon an indictment charging the defendant with manslaughter.

There was evidence on behalf of the State tending to show that on Sunday, 25 April, 1920, about 6 p. m., James A. King was struck by an automobile and injured to such an extent that he died within three or four hours thereafter. At the time of the injury the deceased was on the north side of Hillsboro Street extended, near a sharp turn or curve in the road, about one mile north of the corporate limits of the city of Fayetteville. It is mentioned in the record as the Hillsboro Street Road; and along this thoroughfare the defendant was driving his Ford car when he struck the deceased. The only eye-witnesses to the occurrence were the defendant, his wife, and two colored women who were riding in the machine when the injury occurred. None of these parties, however, gave any evidence in the case.

H. G. Bullock testified that he saw the deceased a few minutes after the injury; that Mr. King was lying on the north side of the street, just beyond the curbing in the road; that he was flat of his back and appeared to be unconscious, and that his left leg was broken; that David Rountree, his wife, and some colored women were there when he arrived; that the defendant was holding Mr. King's head up and asked one of the colored women for something to put under his head, and she went into a house and got a pillow; that the defendant said he was driving the car that hit the deceased. Continuing, the witness stated: The car was six, eight, or ten feet ahead of where the injured man was lying. The two left-hand wheels were in the road and the two right-hand wheels were just across the waterway or berm ditch outside of the road. The used part of the road was a little to the south side near the inside bend. Mr. King's body was on the opposite side. The road at that point is straight but soon turns at almost a right angle and was built for a width of thirty-one feet. It was a new clay road and had not been used a great while. Where the car was, it was moderately hard. I did not notice the track of the car particularly. It was headed westward. The view was unobstructed. I asked some one to phone for a doctor, but as Mr. Patterson drove up, I sent Mr. King to the hospital in his automobile. I do not remember that the defendant said anything about how the deceased was traveling when the car struck him. The defendant was crying before we left.

Lacy Patterson testified: When we got there Mr. King was lying back of a Ford car about four or five feet, with his head on a pillow. His feet were down in a gutter or waterway, and his head was pointed southward. I observed the track of the car. It left the center of the road that would be traveled by a car or buggy 35 or 40 yards off and came straight until it stopped. It showed there were several kinds of tires on the car, and I could trace it by that. When I saw the car the left-hand side was 12 or 15 feet from the beaten track or ruts of the road ordinarily taken by a car. Mr. King's body was right over in the gutter and his feet were down in it. Where his feet were I would say is about 15 or 18 feet from the beaten track. The width of the road at that point was about 20 feet. Over there on the right side of the road where the wheels were standing there was an onion patch; it was cultivated. After carrying Uncle Jim to the hospital I came back and put down some pegs, from which the measurements were taken when they made a map of it. The deceased made no statement as to how the occurrence happened. About two inches of the bone could be seen protruding through his pants where his leg was broken.

Leslie Smith testified that he was a civil engineer and that he made a survey and map of the place where the deceased was injured, and measured the distances on the road as pointed out by Lacy Patterson. The defendant's car left the center of the road at a point 274 feet west of the Linden Road. From this point to where Mr. King's body was found it is 78 feet, and 93 5-10 feet to where the car stopped, which was 15½ feet from the point where the body was found. The width of the road where the car left the center of the track was 28 feet. The road was hard clay surface, but ten feet from the center of the road the soil is sand. The tracks were visible four days afterwards, and it had rained in the meantime. From the south side of the road to where Mr. Patterson said the body was found was about 31 feet. The direction of this road from the Linden Road is almost due west, with an open view all the way.

The defendant offered no evidence, but moved to dismiss the action or for judgment as of nonsuit under the Mason Act, chapter 73, Public Laws 1913. Motion overruled, and defendant excepted.

The jury returned a verdict adverse to the defendant, finding him guilty of involuntary manslaughter. From the judgment pronounced thereon the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. L. Brothers and Bullard & Stringfield for defendant.

STACY, J. We have not stated all the evidence, because the foregoing would seem to be sufficient to dispose of the defendant's appeal. Considering the testimony in its most favorable light to the State, the accepted position on a motion of this kind, we think his Honor properly submitted the case to the jury. *S. v. Oakley,* 176 N. C., 755; *S. v. Carlson,* 171 N. C., 818. The Court's inquiry upon such a motion is directed to the sufficiency of the evidence to support or warrant a verdict. (*S. v. Hart,* 116 N. C., 976), and not to its weight or to the credibility of the witnesses. *S. v. Utley,* 126 N. C., 997.

The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761; *S. v. Tankersley,* 172 N. C., 955. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur. *S. v. Gray,* 180 N. C., 697. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Goetz,* 83 Conn., 437; 30 L. R. A. (N. S.), 458.

Again, it is generally held that where one is engaged in an unlawful and dangerous act, which is itself in violation of a statute, intended and designed to prevent injury to the person, and death ensues, the actor would be guilty of manslaughter at least. *S. v. McIver, supra.* C. S., 2618, provides: "No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person." Then follows an enumeration of certain rates of speed at given places which shall be deemed as violations of the section.

But in fixing the maximum rate within a city or upon the public highways, the statute does not purport to establish a rate of speed which will be lawful under all circumstances. It must not be greater than is "reasonable and proper," considering the time and place, and "having regard to the width, traffic, and use of the highways," nor should it be such "as to endanger property or the life or limb of any person." Proper speed, under given conditions, may be excessive speed under others; and proper speed in the daytime might be grossly excessive at night. *S. v. O'Brien,* 32 N. J. L., 169; *Commonwealth v. Pierce,* 138 Mass., 165.

Section 2616 of the Consolidated Statutes also provides, in part, as follows: "Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, . . . every person operating a motor vehicle shall slow down and give a timely warning or signal with his bell, horn, or other device for signaling. Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public."

If the defendant was operating his machine in disregard of these regulations, and thus occasioned the death of the deceased, he was engaged in an unlawful act. "Involuntary manslaughter," says Wharton Am. Crim. Law (11 ed.), sec. 426, p. 622, "is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony." It does not appear from the evidence why the defendant left the central part of the road and ran out of the beaten path or traveled portion of the highway, nor does it appear why he did not turn aside so as to avoid the collision. Under these circumstances, the jury might well have found that the injury occurred in consequence of the recklessness of the driver, amounting to criminal negligence. *S. v. Biewen,* 169 Iowa, 256. See, also, *S. v. Stitt,* 146 N. C., 643.

The deceased was walking on the outer edge of the road, far from the traveled part of the highway, where he had a right to be. There were no other machines near. The view was unobstructed, and it is difficult to understand how the defendant could have struck the deceased with his car, under all the circumstances, without being guilty of culpable negligence. At any rate, the evidence was sufficient to be submitted to the jury, and they have so found.

No error.

STATE v. J. G. STOKES.

(Filed 13 April, 1921.)

1. **Criminal Law—Statutes—Classification of Offenses—Legislative Discretion—Constitutional Law.**

   The classification of criminal offenses and their punishment is a statutory regulation referred very largely to legislative discretion, and in its exercise may not be interfered with by the courts unless in clearly arbitry instances.

2. **Constitutional Law—Criminal Law—Assaults—Female—Discrimination.**

   C. S., 4215, making conviction in cases of assault without intent to kill or injure punishable by fine or imprisonment, in the discretion of the court, restricting the punishment when no deadly weapon has been used or serious damage done, to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, but excluding from this restriction, among other things, an assault by any man or boy over eighteen years old, on any female person, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution.

3. **Constitutional Law—Criminal Law—Statutes—Affirmative Terms—Court's Discretion—Punishments.**

C. S., 4215, is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intent to kill, the person convicted shall be punished by fine or imprisonment in the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc.

4. **Constitutional Law—Cruel and Unusual Punishments—Legislative Powers—Court's Discretion.**

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, C. S., 4215, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual.

CRIMINAL ACTION. Appeal by defendant from *Cranmer, J.*, at January Term, 1921, of PENDER.

Indictment was for an assault and battery on Jessie Brown, etc. On hearing, defendant plead guilty of statutory assault on a female. C. S., 4215. It was admitted by the solicitor that no deadly weapon was used and no serious damage done. There was judgment that the defendant be confined in the common jail for three months, assigned to work on the roads, etc. Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Stevens, Beasley & Stevens for the defendant.

HOKE, J. The statute more directly applicable, C. S., 4215, provides that:

"In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided*, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person."

Defendant objects to the legality of the punishment imposed upon him in this case on the ground chiefly that the statute presents an unwarranted discrimination against him and others in like case, and to the extent of denying to him the equal protection of the law, but we cannot so hold. In many authoritative decisions dealing with the question, both State and Federal, the power of classification as to the objects of statutory regulation has been referred very largely to the legislative discretion, and its exercise may not be interfered with by the courts unless the same is clearly arbitrary. *S. v. Burnett,* 179 N. C., 735; *Smith v. Wilkins,* 164 N. C., 136; *Efland v. R. R.,* 146 N. C., 135; *Tullis v. R. R.,* 175 U. S., 348-353; *Ins. Co. v. Daggs,* 172 U. S., 562; *McGowan v. Savings Bank,* 170 U. S., 286.

In *Efland's case* the Court stated the principle as follows: "The Legislature had the right to extend the statutory provisions in question to certain classes of pursuits and occupations imposing the requirements equally on all members of a given class, the limitation on this right of classification being that the same must be on some reasonable ground that bears a just and reasonable relation to the attempted classification, and is not a mere arbitrary selection."

And in *Tullis v. R. R., supra,* the Supreme Court of the United States, the final arbiter in these matters, held, as the approved position on the subject, "That the power of the State to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion and it was sufficient to satisfy the demands of the Constitution if the classification was practical and not palpably arbitrary."

Applying the principle in *S. v. Burnett, supra,* a statute was upheld by which citizens of the State under fourteen entirely, and under sixteen to a great extent, were withdrawn from the ordinary effect and operation of the criminal laws of the State, to be dealt with by the special regulations established in the statute, a classification based upon difference of age. And in *Muller v. Oregon,* 208 U. S., 412, the difference of sex was recognized and approved as a proper basis for classification. Speaking to the question in the opinion, *Associate Justice Brewer* said in part:

"Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against her full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions and there are many respects in which she has the advantage over him; but, looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men, and could not be sustained."

That was a decision involving the validity of a statute making special regulations as to her hours of labor, and involving her right and capacity to make a living. And all the more should the distinction be recognized in crimes of violence where the superior physical strength of the man puts her at a disadvantage and wherein the *purpose* of graver injury is not infrequently present. On reason and authority, therefore, the exception based upon an alleged unlawful classification made by the statute must be disallowed.

Defendant insists further that the imposition of a severe sentence of this kind can only be upheld under a statute affirmative in terms, and is not justified in the form now presented and by way of an indefinite exception, but this, to our minds, is not based on a proper concept of the law. On the contrary the statute, by correct interpretation and in effect, provides in affirmative terms that in all cases of assault, with or without the intent to kill, the person convicted shall be punished by fine or imprisonment in the discretion of the court, and within this provision shall be included "assault with intent to kill or with intent to commit rape, and cases of assault and battery on a female by a man or boy over eighteen years of age," this last being the offense for which defendant's submission has been entered.

The objection that the sentence should be annulled on the grounds that it constitutes cruel and unusual punishment is without merit. The constitutional inhibition relied upon here may only be invoked in cases of manifest and gross abuse on the part of the presiding judge.

From a careful consideration of the record, while we are justified in saying that there appears to have been no other purpose on the part of defendant than to aid his mother in the discipline of a child committed to her care and control, we are of opinion that there has been no error committed to defendant's prejudice, and that the sentence is not in itself so severe as to justify the Court in disturbing it as a matter of law.

No error.

STATE v. CHARLIE JONES.

(Filed 20 April, 1921.)

1. **Appeal and Error— Criminal Law— Judgments— Sentence— Court's Discretion.**

Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed therein will not be reviewed by the Supreme Court on appeal where its exercise has not been grossly and palpably abused.

2. **Criminal Law—Statutes—Automobiles—Highways—Intoxicants—Sentence—Court's Discretion.**

The intent of C. S., 4506, is to protect the public from the danger of intoxicated persons, etc., driving automobiles on public highways and streets, and the punishment imposed, being restricted by the statute to a minimum as to fine or imprisonment, is left to the sound discretion of the trial judge.

3. **Courts—Statutes—Jurisdiction—Inferior Courts.**

Where a statute creating a municipal court does not give it criminal jurisdiction over the offense of driving automobiles upon a public highway or street, while intoxicated, etc., this jurisdiction is acquired by Laws 1919, now C. S., 4506, to the extent only of binding the defendant over to the Superior Court upon conviction.

4. **Same—Appearance—Appeal Bond—Presumptions.**

The bond of the defendant given upon being bound over from an inferior to the Superior Court is for his appearance and answering in the Superior Court, and the recital in the bond that it is an appeal is immaterial when the upper court in fact had original jurisdiction of the offense.

5. **Criminal Law—Indictment—Waiver—Statutes—Pleas.**

The defendant, charged with a misdemeanor not containing the element of fraud, deceit, or malice, may, on his appeal to the Superior Court, waive the bill of indictment and the grand jury's action thereon, by appearing and entering a plea of guilty, under C. S., 4610.

6. **Constitutional Law—Statutes—Criminal Law—Indictment—Waiver.**

C. S., 4610, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. Constitution, Art. IV, sec. 13.

7. **Courts—Inferior Courts—Appeal—Superior Courts—Criminal Law—Misdemeanor—Indictment.**

Upon an appeal from an inferior court to the Superior Court from a conviction of a petty misdemeanor, the necessity of a bill of indictment in the latter court is dispensed with.

8. **Appeal and Error—Criminal Law—Pleas—Judgment—Facts Admitted.**

Where a defendant in a criminal action pleads guilty in the Superior Court, on his appeal from the judgment he cannot question the facts charged or the regularity or correctness of the proceedings, and there is nothing for review except whether the judgment is legal upon the facts admitted.

9. Criminal Law—Statutes—Sentence—Cruel and Unusual Punishments.

A sentence of the Superior Court for two years on the public roads for violating C. S., 4506, in running an automobile upon the public highways or streets by one intoxicated, etc., cannot be held as a matter of law on appeal as the unconstitutional imposition of a cruel or unusual punishment.

APPEAL by defendant from *Ray, J.,* at December Term, 1920, of GUILFORD.

The defendant was arrested upon a warrant issued from the municipal court of Greensboro to answer the charge of operating an automobile while intoxicated. He was found guilty and appealed, and was bound over to the Superior Court to answer the charge. At the December Term of the Superior Court of Guilford the defendant in open court, through his counsel, entered a plea of guilty, and the judgment was pronounced. The defendant appealed, assigning as error that the sentence of two years on the public roads was cruel and excessive punishment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

S. B. Adams, R. C. Strudwick, C. C. Frazier for defendant.

CLARK, C. J. The only assignment of error is that the punishment was cruel and unusual, and this is the only proposition set out in the brief for the State and in the brief for the defendant. That point has been recently reviewed and held adversely to the contention of the defendant in *S. v. Woodlief,* 172 N. C., 885, where it was held, "Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed will not be reviewed by this Court on appeal where its exercise has not been grossly and palpably abused," and there is nothing in the record which tends to show that such was the case.

The statute, C. S., 4506, provides: "Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate an automobile upon the public highways of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $50 or imprisoned not less than thirty days, or both, at the discretion of the court." The offense is a most serious one, and in the judgment of the General Assembly it was necessary to enact this provision for the protection of the public from the dangers incident to the operation of powerful and rapidly moving automobiles operated by persons in the condition denounced in the statute. The penalty was intended to be sufficient to deter from the commission of the crime, and the limitation prescribed a minimum and not a maximum punishment. The assignment of error cannot be sustained upon anything that appears in this record.

At the hearing here an exception was taken, for the first time, that the defendant could not be punished in excess of the jurisdiction of the municipal court, because no bill had been found, but this exception, if it could be taken orally, without assignment in the record, cannot be sustained. The statute creating the Municipal Court of Guilford, Laws 1909, ch. 651, sec. 3, prescribing the criminal jurisdiction of that court, specifies the criminal offenses of which it is given jurisdiction, none of which includes this offense, which indeed was not then created, the offense having been created since by Laws 1919, ch. 243, now C. S., 4506. From this it is clear that such court had no jurisdiction of this offense except to bind over the defendant to the Superior Court, which was done, and the defendant gave bond to appear at that court and "answer this charge." The bond is not set out in the record, but it is to be presumed that the defendant was bound over, reciting that he had been fined and appealed, but his bond was to "appear and answer the charge in the Superior Court," and the recital of the appeal, if made, was mere surplusage as the municipal court had no jurisdiction to do more than bind him over, and the trial in that court was a nullity.

When the defendant, bound over to the Superior Court to answer this charge, in open court pleaded guilty, he waived the indictment. The waiver of the bill of indictment is expressly authorized by Laws 1907, ch. 71, now C. S., 4610, as to "A misdemeanor which does not include or contain the element of fraud, deceit, or malice," and it was entered "upon a plea of guilty" and "with the consent of the defendant's counsel."

The Constitution, Art. IV, sec. 13, authorizes the waiver of a trial by jury "in all issues of fact, joined in any court." If a petit jury can be waived, of course the lesser requirement of the charge being formulated by grand jury could be waived, and C. S., 4610, is, on its face, a restriction upon the unlimited right, theretofore more freely exercised, of waiving an indictment.

On the other hand, if the recorder's court possessed the jurisdiction to render final judgment, notwithstanding C. S., 1567 (last clause therein), upon appeal no indictment was necessary. This was held in *S. v. Jones,* 145 N. C., 460, citing *S. v. Lytle,* 138 N. C., 746, upon an appeal from the recorder's court of Winston, where it was held: "In the Superior Court, upon appeal from conviction for a petty misdemeanor, indictment by grand jury is dispensed with." In *S. v. Jones,* 145 N. C., 460, it is said: "In like manner, when a case is tried in the Superior Court on appeal from a justice of the peace, no indictment is required. *S. v. Quick,* 72 N. C., 243; *S. v. Thornton,* 136 N. C., 616."

To same purport *S. v. Crook,* 91 N. C., 540, and the reason is nowhere better given than by *Judge Merrimon* in that case and by *Judge Reade* in *S. v. Quick, supra.* Whether the recorder had jurisdiction or not the sentence appealed from is authorized by the statute and valid.

When the defendant, in pursuance of the terms of his bond, appeared in open court, and with the consent of his counsel pleaded guilty, this was a waiver of indictment for an original offense in that court under the terms of C. S., 4610, and if he appeared to answer the charge upon appeal, no indictment was necessary upon the authorities above cited. In either event, when the defendant pleaded guilty there was no issue requiring a petit jury and still less any requirement of indictment. Why do an unnecessary act? In *S. v. Koonce,* 108 N. C., 754, *Merrimon, C. J.,* said, "If the defendant pleaded *nolo contendere,* or 'guilty,' the court might have proceeded to give judgment."

In *S. v. Warren,* 113 N. C., 684, the Court held that "where a defendant pleads guilty, his appeal from a judgment thereon cannot call in question the facts charged nor the regularity and correctness of the proceedings," but only brings up for review whether the judgment is legal upon the charge admitted, and accordingly in this case the sole assignment of error is that the sentence is excessive punishment, forbidden by the Constitution. Judgment

Affirmed.

STATE v. CHARLIE JONES.

(Filed 27 April, 1921.)

1. **Instructions—Courts—Expression of Opinion—Appeal and Error—Harmless Error—Statutes.**

   Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. C. S., 564.

2. **Criminal Law—Assault on Female—Indictment—Age of Defendant—Statutes.**

   It is not necessary for the defendant's age to be stated in the bill of indictment to convict him for an assault on a female, etc., when the proof clearly showed that he was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact.

APPEAL by defendant from *Ray, J.*, at December Term, 1920, of GUILFORD.

Indictment for assault with intent to commit rape on one Lillian Marshall. The jury rendered a verdict of guilty of an assault on a female. Judgment on the verdict, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

S. B. Adams, R. C. Strudwick for the defendant.

HOKE, J. It is chiefly urged for error that while the defendant was on the stand as a witness in his own behalf the court, in endeavoring to bring the witness to testify on matters relevant to the issue, made comment, "Up to now the defendant's personal testimony was like a Georgia lake, a mile wide and an inch deep." This Court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, C. S., 564, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain. *S. v. Rogers,* 173 N. C., 755; *S. v. Harris,* 166 N. C., 243; *S. v. Cook,* 162 N. C., 586; *Park v. Exum,* 156 N. C., 228; *Withers v. Lane,* 144 N. C., 184; *S. v. Dick,* 60 N. C., 440.

In the present instance, however, while the comments objected to may have been ill-advised, we are of opinion that they should not be held for reversible error because, from the facts and attendant circumstances disclosed in the record, it appears that they were made and necessarily understood as a mere pleasantry, and could have reasonably had no appreciable effect on the result. The defendant, a witness in his own behalf, had been testifying for some little time and had said nothing material or relevant to the issue. The judge, with commendable patience had requested his counsel to direct the statements of the witness to the matters on issue; the judge himself had tried more than once, and in another effort in this direction made the remark objected to. It was not intended or understood as a comment adverse to the witness on his character or veracity or the weight of his evidence on any essential feature of the charge, but on the rambling and irrelevant nature of the witness' statements to that time. And herein the instant case differs from that of *S. v. Rogers,* to which we were cited on the argument. There a defendant, testifying in his own behalf, was told by the presiding judge "to answer the question more concisely and quit dodging," an adverse comment on the witness both as to his manner and the weight of his statements, well calculated to prejudice defendant and his cause in the estimate of the jury.

Defendant excepted further and moved on arrest of judgment that there was no charge in the bill that defendant had made an assault on a female, he being at the time over eighteen. The proof clearly showed that the defendant was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact. On the form of the bill, the objection was expressly resolved against the defendant in *S. v. Smith,* 157 N. C., 578.

On the record, there has been no error shown that would justify the Court in disturbing the results of the trial, and the judgment of the court below is affirmed.

No error.

STATE v. DENNIS JESSUP.

(Filed 27 April, 1921.)

1. **Criminal Law—Larceny—Felonious—Intent—Instructions.**

   Although the trial judge has stated correctly the contention of the defendant as to guilty knowledge, it was error for him to exclude from the consideration of the jury certain evidence which the defendant offered to disprove, and which tended to disprove, such guilty knowledge or felonious intent.

2. **Criminal Law—Larceny—Evidence—Felonious Intent.**

   In order to show that there was no felonious intent or guilty knowledge in taking or receiving an automobile, it is competent for the defendant to show that the party who took the car, which was similar to one which he himself owned, did so by mistake, believing the car to be the one which belonged to him or his employer, and this would be competent evidence on behalf of the defendant, indicted for receiving the car knowing it to be stolen, as it tended to show an absence of felonious intent of the person who took the car, and, therefore, an absence of guilty knowledge by the defendant, who afterwards received it.

APPEAL by defendant from *Ray, J.,* at January Term, 1921, of RICHMOND.

The defendant was indicted jointly with one Maner for the larceny of a Ford automobile, the property of one H. H. Anderson, and there was a count for receiving. The plea was not guilty. On the trial the defendant, in order to show that he had no felonious intent and really did not steal the car, proposed to inquire of the defendant Maner, who was a witness in his own behalf, as to any knowledge he had that the Ford car had been stolen, and the evidence was excluded, the defendant noting an exception. There was evidence that on a Saturday night Maner, Jessup, and Shaw drove from Fayetteville to Rockingham in a Lexington car belonging to Maner, and after spending a part of Sunday in Rockingham, they drove at night to Hamlet, six or seven miles away, and at about 8 o'clock the same night Jessup and Shaw drove back to Fayetteville from Hamlet in the Lexington car belonging to Maner, and later in the night Maner followed them to Fayetteville in the Ford car belonging to Anderson, which he found on the street in front of a moving picture house. When he arrived at Fayetteville he left the Ford car in front of his boarding house until morning and then placed it in front of the Jessup garage. An extra tire and some other minor equipment were taken from the Ford car and left in the garage.

There was evidence offered, but rejected by the court, that there had been an agreement between Maner and his brother-in-law, Jim Dleykan, that Maner should take Dleykan's car to Fayetteville and sell it, and that Maner made a mistake in taking the Anderson car for the Dleykan car, as the two looked very much alike, both being Fords of the same model, and that there was no intention of stealing the Anderson car. Defendant was convicted, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. C. Downing and McCormick & Clark for defendant.

WALKER, J., after stating the facts: Notwithstanding the exclusion of the evidence as to intent, the court charged the jury, as to one of the contentions of the defendant, being that the agreement had been made with Dleykan and that the Anderson car was taken by Maner through error as to its identity and ownership, because of its similarity to the Dleykan car, explaining to the jury that, as defendants therefore contended, there was no felonious or dishonest intent in taking the Anderson car, but, by his previous ruling, he had left the defendant Jessup without the evidence to support this contention, and also without the evidence to show that he had no knowledge that the Anderson car had been stolen. If we concede that there was evidence for the jury to the contrary of Jessup's contention, that is, such as would tend to show his guilty knowledge and felonious intent, it was error to exclude the evidence and thus disarm him so that he could not defend himself against the charge of the State.

It was manifestly competent to show by the defendant himself, if testifying in his own behalf, not only the absence of guilty knowledge that the car had been stolen, if it had been, but also the absence of Maner's intent to steal it. This Court has expressly ruled upon this question of guilty knowledge, guilty motive or intent, in *Phifer v. Erwin,* 100 N. C., 59, at p. 65, where *Chief Justice Smith* said, citing and quoting from *S. v. King,* 86 N. C., 603: "The test of the admissibility of the evidence of motive or intent is the materiality of the motive or intent in giving character to the act, and when they must, as separate elements, coexist to constitute guilt or produce a legal result. When, as distinct facts, each must be alleged and proved, the inference to be deduced may be met and repelled by the direct testimony of the party as to their being entertained by him." 1 Wharton on Evidence, sec. 482. This is direct instead of circumstantial evidence as to guilty intent or knowledge or motive. In the *Phifer case* the plaintiff, on his own behalf, was allowed, after objection, to state that he knew nothing of any understanding between the parties to the mortgage that the mortgagor was to remain in possession when the goods were delivered to him, nor of any purpose on the part of either to defraud the mortgagor's creditors, and this upon the question of plaintiff's fraudulent knowledge or intent. This was held to be admissible.

There are several assignments of error as to other rulings, but they may not be presented again, and we will not consider them.

There was error in the rulings, as indicated above, because of which the defendant Jessup is entitled to another jury.

New trial.

STATE v. FRONTIS DIGGS ET AL.

(Filed 27 April, 1921.)

Criminal Law—Conspiracy—Indictment—Evidence—Others Not Named—Instructions—Appeal and Error.

Where the bill of indictment charges a conspiracy resulting in the commission of a crime by persons named in the bill and others, and there is evidence thereof not only as to those named but also as to others, a charge that it takes more than one person to make a conspiracy, but confining the definition of conspiracy to a conviction of more than one of the parties defendant, is reversible error, in leaving out of consideration the evidence that one of those named in the bill may have conspired with others not named therein.

APPEAL by defendants from *McElroy, J.*, at September Term, 1920, of ANSON.

Criminal prosecution, tried upon an indictment charging the defendants (fourteen in number) with conspiring, confederating and agreeing among themselves and with others to unlawfully and feloniously assault and murder one W. H. Watkins.

The evidence, tending to show an unlawful conspiracy among the defendants, was equally as strong in establishing that others, not named in the bill, participated in what took place and aided and abetted the present defendants or some of them.

Upon the question as to what verdict might be rendered, his Honor charged the jury as follows: "Gentlemen of the jury, you may return a verdict of guilty as to any two or more of the defendants or you may return a verdict of not guilty as to one or all of the defendants. You cannot find one alone guilty because it is necessary that at least two combine in order to form a conspiracy. So your verdict may be guilty as to any two or more or all, or not guilty as to one or more or all, as you may find and are satisfied from the evidence." Defendants excepted.

The court directed a verdict of not guilty as to seven of the defendants; two were acquitted by the jury, and the remaining five, to wit, Frontis Diggs, Alex. Douglass, Watt, Frank and Ben Robinson, were convicted, and from the judgments pronounced they appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McLendon & Covington and R. B. Redwine for defendants.

STACY, J. The defendants were tried jointly, and rightly so. But we think his Honor erred in charging the jury that a verdict of guilty could not be returned against one of the defendants singly and that all should be acquitted unless as many as two were convicted. It is true the crime of conspiracy cannot be committed by one person alone. It requires the confederation of at least two and, of course, it may include more. *S. v. Christianbury,* 44 N. C., 46; *S. v. Younger,* 12 N. C., 357. But the bill charged that the defendants conspired among themselves *and with others.* Hence, the jury might have found that only one of the defendants participated in the alleged offense with another or others not on trial. The instruction would have been correct had there been no evidence tending to incriminate others along with the present defendants, or had the indictment not been *cum multis aliis.* *S. v. Tom,* 13 N. C., 569. Under the instant circumstances, however, we think the charge, as given, was prejudicial to the defendants, entitling them to a new trial.

There are other exceptions, appearing on the record, worthy of consideration, but as the case goes back for another hearing, and as they may not occur again, we refrain from further comment.

New trial.

STATE v. LUCIUS ROBINSON.

(Filed 4 May, 1921.)

1. **Homicide—Self-defense—Evidence—Criminal Law—Appeal and Error.**

   Where upon the trial for a homicide there is evidence tending to show that the deceased had drawn his pistol on his brother after a quarrel between them, at the same time threatening his life, and then they commenced shooting at each other, which resulted in death, upon the trial for a homicide the prisoner, by his own testimony, may show, with the burden of proof on him, that without default on his own part he had shot and killed under a reasonable apprehension of his own death or great bodily harm; and the exclusion of his answer to a question to the effect that he so believed when he fired the fatal shot, is reversible error on his appeal, which will entitle him to a new trial.

2. **Same—Instructions—Trials.**

   Where evidence of self-defense is erroneously excluded on the trial for a homicide, the error is emphasized by an instruction to the jury that a verdict of guilty of manslaughter at least should be returned, unless the jury should find that the prisoner had abandoned the fight in good faith or had signified his purpose to do so before firing the fatal shot.

INDICTMENT for murder. Appeal by defendant from *Ray, J.*, at January Term, 1921, of UNION.

In proper time the solicitor announced that a verdict of murder in the first degree would not be insisted on, and the cause was submitted to the jury as to the lesser offenses included in the charge. Defendant was convicted of the crime of manslaughter. Judgment, and he excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Vann & Milliken, Williams & Stewart for the defendant.

HOKE, J. There were facts in evidence for the State tending to show that on 22 October, 1920, the defendant, Lucius Robinson, his brothers, Noah and Fred, and two nephews, John and Martin Robinson, were going to Monroe, N. C., in a Ford automobile. That Noah Robinson, the deceased, and defendant began a quarrel in the car. That Lucius got on the ground and "after the word damn was used" commenced firing, inflicting on Noah a mortal wound from which he died some time that night.

There was other testimony to the effect that the five men were going to Monroe in the automobile and Fred, one of the brothers, became sick and it was decided best to return. That Lucius wished to go on and got out of the car, and after some angry words between him and Noah, the deceased, defendant started walking to Monroe. That, wishing to induce Lucius to go back with them, John, who was driving, turned the car and backed it up the road after Lucius. Passing him about three steps, Noah, the deceased, said to Lucius, "G— d— you, get in this car and go home." Lucius made no effort to get in and Noah drew his pistol and said, "Damn you, I will kill you if you are the last brother I've got." Noah drew his pistol just as he said "Damn you, I'll kill you if you are the only brother I've got," and at that time the shooting began. (This witness said he did not know which fired first.) And in the shooting, Noah received a mortal wound from which he died that night as stated.

During the trial, when defendant was testifying as a witness in his own behalf, after admitting that he had shot Noah, he was asked whether at the time he fired he believed Noah was about to shoot him. On objection the question and answer were excluded. The answer would have been that the witness believed the deceased was going to kill him. This same question, substantially, was put to the witness in different forms and both question and answer excluded, as follows:

"State, Mr. Robinson, whether or not you would have shot Noah unless you had thought he was about to shoot you."

Again, "When you saw him with a pistol in his hand and he told you to get in the car, what did you think?"

Further, "You may go ahead and tell his Honor and the jury, Mr. Robinson, when your brother Noah drew his pistol and told you to get in the car what, if anything, did you believe he was going to do?"

Another, "Please state whether or not, Mr. Robinson, at the time you fired at your brother you believed he was about to shoot you."

On the facts presented, the principle of self-defense would arise to defendant if, being in no default himself, he killed his brother when he believed and had fair and reasonable ground to believe that he was in danger of death or great bodily harm from his brother's assault. While, in order to sustain this position, defendant must satisfy the jury that he had a fair and reasonable ground to apprehend some harm to himself and it was necessary to kill for his own protection, the evidence excluded by these rulings in some form should have been received as tending to establish defendant's right of self-defense.

The decision is emphasized by the fact that the judge, among other things, instructed the jury that if defendant entered into the fight willingly he would be guilty of manslaughter, at least unless before the killing he abandoned the fight in good faith, and in some way signified his purpose to do so, under the doctrine approved in *S. v. Kennedy*, 169 N. C., 326. In this aspect of the case, also, the excluded evidence bore directly on the issue of guilt or innocence and should have been received.

By the ruling of his Honor we are of opinion that the defendant has been erroneously deprived of the right to testify in his own behalf on matter material to his defense, and is entitled to a new trial.

New trial.

STATE v. JAMES COBLE.

(Filed 4 May, 1921.)

1. **Courts—Jurisdiction—Juvenile Courts—Investigation—Justices of the Peace—Statutes.**

   The juvenile court, as a separate part of the Superior Court, is given by C. S., 5039, among other things, the sole power to investigate charges of misdemeanors, and of felonies with punishment not exceeding a ten-year imprisonment, made against children between the ages of fourteen and sixteen years, at the time of the offense committed, and excludes the jurisdiction of the justice of the peace to bind them over to the Superior Court in such instances. *S. v. Burnett*, 179 N. C., 735, cited and applied.

2. **Same—Assaults—Deadly Weapon—Superior Court—Transfer of Causes—Removal of Causes.**

   The juvenile court has exclusive jurisdiction over investigating a charge of an assault with a deadly weapon, inflicting a serious injury, made by a child within sixteen years of age, and where a justice of the peace has assumed jurisdiction and bound the defendant over to the Superior Court, the case will, on motion, be removed to the juvenile court, to be proceeded with as the statute directs, though at the later date the offender's age may be more than sixteen years. C. S., 5039.

3. **Courts—Juvenile Courts—Jurisdiction—Correction—Infants—Children—Minority—Statutes.**

   Where the jurisdiction of the juvenile court has once attached it remains during the minority of the youthful offender, for the purpose of his correction and reformation. C. S., 5039.

4. **Statutes—Discrepancies—Courts—Juvenile Courts.**

   Semble, the provision of sec. 3, ch. 97, Public Laws 1919, that the meaning of the word "child" shall be one "less than eighteen years of age," and the term "adult" shall mean any person eighteen years old or over, intended, from the interpretation of the entire chapter, that to come within the provision of the act the child should be a minor under the age of sixteen years, and *Held*, the discrepancy is cured by C. S., 5041.

APPEAL by the State from *Ray, J.*, at January Term, 1921, of ANSON.

Criminal prosecution for an assault with a deadly weapon, inflicting serious injury upon one Ellis Harrington.

It is admitted that at the time of the alleged assault, 2 May, 1920, the defendant was less than sixteen years of age; that he was arrested upon a warrant issued by a justice of the peace, and that upon the preliminary hearing a motion was made to transfer the cause to the juvenile court, based upon the following affidavit:

"W. D. Coble, being duly sworn, says that he is the father of Jim Coble, the defendant, and that the said Jim Coble is only fifteen years of age, and will not be sixteen until in July, 1920.

"Wherefore, in behalf of said minor, he asks that the charge of assault against him be removed to the juvenile court for Anson County.

"W. D. COBLE.

"Sworn to and subscribed before me, this 5 May, 1920.

"E. E. BARRET, J. P."

This motion for removal was denied by the justice, and the defendant was bound over to appear and answer the charge preferred against him at the next term of the Superior Court.

At the September Term, 1920, of Anson Superior Court a bill of indictment was returned by the grand jury, to which the defendant was required to plead; and it is admitted that at the time of the finding of said bill the defendant had reached the age of sixteen years.

When the case was called for trial at the January Term, 1921, the defendant renewed his motion to have the cause transferred to the juvenile court. This motion was overruled. Whereupon the defendant, reserving his right to enter a plea in abatement, submitted to the offense and moved to be discharged upon the ground that the prosecution had abated by reason of the fact that his case, at the time of the alleged occurrence, was cognizable only in the juvenile court, and that, as he had reached the age of sixteen years without any valid action having been taken against him, the Superior Court at term was without authority to proceed further in the cause. This motion was allowed, and the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Tarlton & Edwards for defendant.

STACY, J. Chapter 97, Public Laws 1919, now C. S., 5039, *et seq.*, was before the Court for construction in the case of *S. v. Burnett*, 179 N. C., 735, where, among other things, it was held that children under sixteen years of age, charged with being delinquent by reason of the violations of the criminal laws of the State, should not be treated as criminals except in certain cases, and that the statute provided and was intended to provide in effect:

1. That the Superior Courts shall have exclusive original jurisdiction

over all cases coming within the provisions of this act; and there shall be established in each county a juvenile court, as a separate part of the Superior Court of the district, for the hearing of all such matters and causes.

2. That children under fourteen years of age are no longer indictable as criminals, but in case of delinquency must be dealt with as wards of the State, to be cared for, controlled and disciplined with a view to their reformation.

3. That children between the ages of fourteen and sixteen, when charged with felonies in which the punishment cannot exceed imprisonment for more than ten years, are committed to the juvenile court for investigation, and if the circumstances require it, may be bound over to be prosecuted in the Superior Court at term, under the criminal law appertaining to the charge.

4. That children of fourteen years and over, when charged with felonies in which the punishment may be more than ten years imprisonment, in all cases shall be subject to prosecution for crimes as in case of adults.

5. That in matters investigated and determined by the juvenile court no adjudication of such court shall be denominated a conviction; and further, that no child, dealt with under the provisions of the act, shall be placed in any penal institution or other place where they may come in contact with adults charged with or convicted of crime.

6. "When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purposes of this act during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interests of the State." Sec. 1.

7. "This act shall be construed liberally and as remedial in character. The powers hereby conferred are intended to be general and for the purpose of effecting the beneficial purposes herein set forth. It is the intention of this act that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the State, and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case." Sec. 4.

From the foregoing it follows that the defendant's motion for removal of his cause to the juvenile court for investigation and determination, according to the law appertaining to the charge, should have been allowed. The defendant has committed no offense for which he may be treated as a criminal under the statute. He is charged with a misdemeanor, though a serious one, and not a felony over which the Superior Court at term would have jurisdiction. His delinquency or conduct, which makes him amenable to the law, is cognizable, in the first instance, only in the juvenile court. Hence the indictment returned by the grand jury should be dismissed and the case remanded to the juvenile court for its consideration.

The identical question here presented was before the Supreme Court of Kentucky in the case of *Mattingly v. Commonwealth,* 171 Ky., 222, where it is said: "Upon the question of jurisdiction, the only point raised here that is not concluded by former decisions of this Court is the suggestion that the age at the time of trial, rather than at the time the crime was committed, should prevail. In our judgment, however, this suggestion is unsound from the very terms of the statute as well as upon reason. The statute defines a 'delinquent' child to be one who, of the ages specified, commits any of the acts named, including the crime charged here, and then vests in county courts of the State exclusive jurisdiction to try such 'delinquent' children. They become 'delinquent' children, by the commission of the act denounced, when the acts are committed, and the jurisdiction then vests exclusively in the county court, which court, having thus acquired exclusive jurisdiction, cannot be ousted by its failure to act.

"The very purpose of this law, as has been declared by this Court upon more occasions than one, is to provide for the protection and care of juvenile offenders in a humanitarian effort to prevent them from becoming outcasts and criminals, rather than to inflict punishment for their delinquencies. To hold that the officers charged with the execution of the law may defer action until the offending child has passed the age thus protected by the statute, and then prosecute him as a criminal and not as a juvenile, would defeat the very purpose of the law and cannot be sanctioned."

Probably it should be noted that in sec. 3, ch. 97, Public Laws 1919, it is provided that the term "child," when used in this statute, shall mean any minor less than *eighteen* years of age; and the term "adult" shall mean any person eighteen years of age or over. Reading the entire context of the chapter, however, it would seem that the Legislature intended to say that a child, to come within the provisions of the act, should be a minor under *sixteen* years of age, rather than under eighteen. This discrepancy evidently was occasioned by the fact that the law of 1915, which was repealed by the law of 1919, provided that the term "child," when used in that act, should be a minor under eighteen years of age. But this variance apparently has been corrected as will appear from section 5041 of the Consolidated Statutes, and can have no material bearing here.

The jurisdiction of the juvenile court is not to be ousted or denied by reason of the fact the defendant has now reached the age of sixteen, for it is clear that his age at the time of the commission of the offense, rather than at the time of trial, is to determine his guilt or liability and the tribunal which shall take cognizance of his case. Furthermore, he is not to be tried as a criminal but as a juvenile delinquent; and, under the express provisions of the statute, the jurisdiction of the juvenile court, having once attached, continues for the purposes of correction and reformation during the minority of the defendant.

The case will be remanded with direction that the indictment be dismissed and that the defendant be committed to the juvenile court for further proceedings. It is so ordered.

Error.

STATE v. JOHN HILL.

(Filed 4 May, 1921.)

1. **Criminal Law—Rape—Assault With Intent—Evidence—Nonsuit—Trials.**

Upon the trial for an assault upon a female with intent to ravish, evidence that the defendant, living in the same house, entered the room of the prosecutrix at night through the partly open door to her room, and while she was asleep, placed his hand upon her hand and upon her forehead, and immediately left upon her waking and ordering him to do so, is insufficient to convict under the charge of an intent to ravish her or to effect his unlawful purpose without her consent, and on this count a judgment as of nonsuit should be granted under the statute.

2. **Same—Indictment—Court—Assault Upon a Female—Evidence—Nonsuit—Trials.**

Where the charge in the bill of indictment is an assault with the intent to ravish, the defendant, upon sufficient evidence, and if he is over the age of eighteen years, may be convicted of an assault upon a female, under the terms of our statute, as if this charge had been stated as a separate count; and evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her hand and upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though insufficient for a conviction of the intent to ravish her.

APPEAL by the defendant from *Lane, J.*, at May Term, 1920, of MECKLENBURG.

The defendant was indicted for an assault upon Ruth Martin with intent to ravish her.

The evidence against the defendant will sufficiently appear from that given by the prosecutrix herself, which is as follows:

"On 12 April, 1920, I was living with my father, R. T. Martin, on North Caldwell Street. I am past eighteen years of age. I sleep on the second floor of my father's residence. The defendant, John Hill, was boarding and lodging at my father's house. Had been with us about a week before the alleged assault. Hill roomed on the second floor with a man by the name of Smith. Their room was diagonally across from where I sleep with my little brother, about ten years of age. Smith had been at my father's house about a week. Mr. Hill ate at our table. I had talked with him several times and knew him when I saw him and knew his voice. Up to the time of the alleged assault Hill had conducted himself in word, manner, and deed as a gentleman. On the night of 12 April, 1920, I retired with my little brother about 8:30 o'clock. I left my door partly ajar, as I usually did, to call my father in case of sickness of my brother. About 11 o'clock I was aroused by some one placing his hands on my forehead; also on my hand. I first thought it was my father. I said, 'Papa.' I then realized that it was not my father. The room was dark; I was frightened by the man putting his hand on my forehead and on my hand. I screamed out, 'Who is that?' He said, 'It's John, John Hill.' I said, 'John Hill, what are you doing in here? Get out of here.' I recognized him by his voice. (That was the only way I could recognize him.) There was no light in the room. I said, 'Get out of here.' John went out like a 'jiffy.' He immediately left the room. From the time I said, 'What are you doing here?' until he left the room didn't take two minutes. All he did to me was simply to put his hand on my hand and on my forehead. When I said 'Get out,' he immediately got out. I was greatly excited. I told my father what had happened. That was all that occurred. John Hill had a peculiar voice and accent that was easily distinguished. I know John Hill was the man who was in my room."

By prayers for instructions the defendant requested the court to charge the jury, in substance, that there was no evidence of the charge for them to consider and they should acquit the defendant. The court refused to do so, and the defendant excepted. He was convicted, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. L. Kirkpatrick and Clarkson, Taliaferro & Clarkson for defendant.

WALKER, J., after stating the case: It has been the settled rule of this State, ever since the case of *S. v. Massey,* 86 N. C., 658, was decided, that in order to convict a defendant on the charge of an assault with intent to commit rape the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. It was held in the *Massey case* that the evidence there offered by the State was wholly insufficient for a conviction, and the facts were very much stronger than those we find in this record, giving the State the benefit of considering them in the most favorable light for it. The *Massey case* has been approved several times. *S. v. Smith,* 136 N. C., 684; *S. v. Jeffreys,* 117 N. C., 743. It has been said that it is neither charity nor common sense nor law to infer the worst intent which the facts will admit of, the reverse being the true rule both of justice and of law. The guilt of a person is not to be inferred because the facts are consistent therewith, as they must be inconsistent with his innocence. *S. v. Massey,* 86 N. C., 658; *S. v. Adams,* 133 N. C., 671; *S. v. Jeffreys, supra; S. v. DeBerry,* 123 N. C., 703. The defendant entered the room where the prosecutrix and her little brother were sleeping, and did nothing more than place his hands on her forehead and hand. She was awakened and screamed, inquired as to who it was, and was told that it was John Hill, the defendant, whom she had known very well. When she asked him what he was doing in the room and told him to get out, she testified that he left immediately, or, in her own words, "in a jiffy." He made no demonstration of force or violence against her, and there was nothing said or done by him indicating any intent on his part to do her harm by the use of force, and certainly nothing to show that he came into the room with the intent to ravish her. His sole purpose was to solicit the gratification of his sexual desires, if he had any evil intent at all. This, of course, was unlawful, and he committed an assault upon her by placing his hands on her forehead and hand, against her will, but this was not the crime charged in the bill of indictment. The specific intent was lacking.

The evidence in *Comm. v. Merritt,* 14 Gray (Mass.), 415; *S. c.,* 77 Am. Dec., 336), was much stronger than is the evidence in this case to show "the intent to ravish," and yet that Court held that the alleged intent was not shown, but a very different one, and that is the case here.

We cannot grant the nonsuit, as the defendant could have been convicted of an assault the same as if it had been separately charged in an indictment. C. S., 4639. Where the assault is upon a woman and the assailant is over eighteen years old, he may be punished as provided by the statute. C. S., 4215.

The Attorney-General states, in his brief, that "he had been unable to find a case in which this Court has sustained a conviction on evidence altogether as inconclusive as the above," meaning the testimony in this case. He cites several cases to sustain the judgment, but it appears on examining them that they are clearly distinguishable, and one of them (*S. v. Page,* 127 N. C., 512) is expressly so held to be in *S. v. Smith, supra.*

The court erred in refusing the fourth prayer for instructions and in charging that there was evidence of the criminal intent, though the judge was correct in denying the motion for nonsuit, as defendant could have been convicted of an assault upon the evidence and under proper instructions to the jury.

New trial.

STATE v. SON CARRAWAY.

(Filed 4 May, 1921.)

1. **Homicide—Murder—Exclamations—Res Gestae—Hearsay Evidence—Criminal Law—Appeal and Error.**

There was evidence upon the trial of a homicide tending to show that the prisoner entered unwillingly into the fight resulting in death, and acted throughout in self-defense, and that while engaged in a struggle with the deceased the latter cut him upon the face, neck, and throat, causing a profusion of blood to flow: *Held,* it was competent for an eyewitness to testify to the exclamation of another then coming up, and as a part of the *res gestae,* that the deceased was cutting him to pieces, and not objectionable as hearsay evidence of a past transaction; and the exclusion thereof was reversible error.

2. **Homicide—Murder—Criminal Law—Self-defense—Threats—Communications—Evidence—Appeal and Error.**

Where the evidence is sufficient upon the question of self-defense upon the trial for a homicide, the exclusion of evidence tending to show that a near relative of the deceased had previously warned the prisoner of the deceased's threat to kill him, constitutes reversible error.

3. **Homicide—Murder—Criminal Law—Dangerous Character of Deceased—Evidence—Self-defense—Appeal and Error.**

Upon the trial of a homicide, it constitutes reversible error for the trial judge to exclude evidence of the dangerous character of the deceased when drinking when there was evidence that he was in this condition at the time, and that the prisoner had shot and killed the deceased in self-defense.

APPEAL by defendant from *Ray, J.,* at the January Term, 1921, of ANSON.

The defendant was tried on a bill of indictment charging murder of Frank Robinson, and he was convicted of manslaughter with a recommendation by the jury to the mercy of the court. From the judgment upon such conviction he appealed. The solicitor, at the outset, declined to ask for a verdict of murder in the first degree, but did ask for one of murder in the second degree.

The State's evidence tended to show that the defendant had been charged with begetting a bastard child on the person of a sister of the deceased; that the deceased had made many threats against the defendant, which threats were communicated to him; that in consequence of such threats the defendant armed himself with a pistol and came to the town of Wadesboro on 8 May, 1920; that the deceased sought him out and the trouble occurred between them in front of Gilmore's store, in that town; that he entered into the fight willingly, and killed the deceased with the pistol without legal excuse.

The evidence of the defendant tended to prove the following facts: On 8 May, 1920, the defendant, who resides in the country, came to Wadesboro to deliver milk and butter for his mother. He brought with him a raincoat. He placed this raincoat behind the counter in the store of Mr. Gilmore, together with a pistol. After he had delivered his produce he arranged to ride home with a friend, and went into Gilmore's store to secure his coat. The pocket in the raincoat was shallow and torn, and as his pistol could not be carried in his pocket, he placed the pistol in the pocket of his overalls, and turned to leave the store. The deceased accosted the defendant. The defendant paid no attention to him. The deceased then called the defendant: "Son Carraway, God damn you, you heard me!" The defendant had descended the store steps and was on the sidewalk. The deceased then said: "You God damn son of a bitch, didn't you hear me?" The defendant answered: "Speak to me like I am a human; I am not a dog." Mr. Gilmore, the proprietor of the store, heard this conversation, and stepped up to the two, and placed his hand on Robinson's shoulder and warned him that he would get into trouble, and that he had better leave. He testified that the deceased, Robinson, was still cursing the defendant, and had a knife in his hand. Also that the defendant did not curse, and said nothing more than that he was not afraid of Robinson. Gilmore, seeing that Robinson was bent on trouble, turned his back and went into the store. At this time Carraway, the defendant, undertook to leave, and Robinson got in front of him and cut him off. Defendant turned again, and was again obstructed by the deceased. The deceased then cut the defendant with a knife, entering on the left side of the forehead above the eye, the wound extending down the face, around under the ear, and on the throat. The wound was not dangerous, but bled profusely. After inflicting this blow the deceased grabbed the defendant with his left arm around the neck, clutched his neck with his body pressed against the defendant's right arm and shoulder. This grasp of the defendant by the deceased was described by the witnesses as the "sandy crook." The position of the deceased was such as to enable him to hold the defendant fast by the neck and by the weight of his body prevented the movement of his right arm. Deceased then undertook to again cut the throat of the defendant, and continued in this effort for some time. The two struggled up the street a few steps, the deceased all the time undertaking to cut the defendant's throat. The defendant, being unable to disengage himself from this "sandy crook," succeeded in drawing his pistol from his pocket and pressed the same against the body of the deceased and fired twice, inflicting mortal wounds. When these shots were fired the deceased was undertaking to reach the throat of the defendant with his knife. After these shots were fired the defendant released himself and at this time he described himself as being dizzy from the blow that he had received and was knocked out of his senses; the blood was just pouring over his face, and he apprehended that his injuries were serious ones. His eyes and face were covered with blood, and in this way his vision became blurred and obstructed. The deceased was then in a stooping or half-sitting posture on the steps of Tice's store. The defendant got a few feet from the deceased and he turned around to see what the deceased was doing. The deceased was gritting his teeth, and had his hand in his hip pocket. The defendant testified that he thought the deceased was fixing to spring toward him again. He then shot three more times. The last shots were superficial and not sufficient to produce serious injury.

It was in evidence that Frank Robinson, the deceased, was under the influence of whiskey at the time of the difficulty.

The defendant assigns the following errors which are based on exceptions appearing in the record:

1. Joe Winfield testified that he was passing Gilmore's store, and saw the beginning of the trouble; that he went back to where the defendant and the deceased were and tried to stop them; that he told the deceased to let the defendant alone; that the deceased paid no attention to him, and that when the defendant tried to leave the deceased got in front of him and stopped him; that at this time the deceased came out with his knife; that they were hooked up together, and scuffled for some distance, and that the deceased struck the defendant somewhere about the face with his knife. The witness was asked this question:

Q. Do you remember who else you saw around there? A. Mr. Jockey Martin—him and his lady had passed and were in the beef market and he come back to me and says, "Joe, he is going to cut him to pieces, ain't he?"

By the court: Was the fight going on at that time? A. Yes, sir.

To the foregoing evidence the State objected. Objection sustained, and the evidence excluded from the jury. The defendant excepted.

2. The defendant, being recalled, testified: "I had been knowing Frank Robinson for about ten years. I knew his reputation for violence when he was drunk. He was mean. He would kill you. He had killed one man."

Motion by the State to strike out answer. Motion allowed, and the defendant excepted.

3. The defendant testified: "Threats were communicated to me as being made by Frank Robinson. Will Robinson's daughter communicated the first threat. She met me on the street down here at Mr. Fulton Allen's store and said to me the boys had decided to leave it to her mother to let her do what she wanted to do. The boys were Will, Lee, and Daisy. These were Frank's brothers. Said they decided to leave it to her mother and let her do what she wanted to do. All except Frank, and Frank said, 'He would be G— d— if he was going to leave it to her—he was going to kill the G— d— s— o— b—. She came to where I was, laughing, and said I had better watch Frank Robinson. I guessed she was referring to the charge that I was the father of the child of Frank Robinson's sister."

At this juncture the State moved to strike out the evidence of the foregoing threats. Objection sustained, and the evidence withdrawn from the jury, to which the defendant excepted.

There are other exceptions to the charge.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McLendon & Covington and Robinson, Cauble & Pruette for defendant.

ALLEN, J. The rulings on evidence are erroneous and entitle the defendant to a new trial.

The declaration of Martin, "Joe, he is going to cut him to pieces, ain't he?"—made after the deceased had cut the defendant once, and while he had one arm around his neck and the knife on his throat, was competent as a part of the *res gestae.* McKelvey says, p. 278: "The ground of reliability upon which such unknown declarations are received is their spontaneity. They are the *ex tempore* utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings."

The question is discussed, and the distinction drawn between the exclamation of the bystander brought out by the occasion, and declarations that are narrative of a past occurrence in *Harrill v. R. R.*, 132 N. C., 655, and *Bumgardner v. R. R.*, 132 N. C., 440, and the Court says in this last case: "The law proscribes *hearsay* evidence; but there are certain necessary exceptions to that general rule. Amongst those exceptions are certain declarations made at the time of the main transaction—the principal fact under investigation—if they are connected with the transaction and explain it as to its character and purpose. Such declarations are often called '*verbal acts* indicating a present purpose and intention,' and are admissible as original evidence like any other material facts. It is said in Greenleaf on Evidence, sec. 108: 'The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character.' The same author, in the same book, sec. 110, further says: 'It is to be observed that where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act, and so connected with it as to be regarded as a mere result and consequence of the coexisting motives in order to form a proper criterion for directing the judgment, which is to be formed upon the whole conduct.' In *S. v. McCourry,* 128 N. C., 594, the prisoner was indicted for murder. Melvin Ray, one of the witnesses, said at the time of the homicide, in answer to a question by a person who was present, 'What that was?' referring to a 'lick,' 'Elijah McCourry hit Bob Ray (the deceased) with a rock.' This Court said the evidence was competent because it was spoken at the instant the fatal blow was given. The Court also quoted with approval from Underhill's Criminal Evidence, sec. 1, the following: 'The exclamations of persons who were present at a fracas in which a homicide occurred, showing the means and mode of killing, are admissible for or against the accused because of their unpremeditated character and their connection with the event by which the attention of the speaker was engrossed.' "

The evidence excluded comes clearly within this principle.

It was also error to exclude the reputation of the deceased for violence when drunk, as there was evidence the deceased was drunk at the time, and the threat communicated to the defendant by a close relative of the deceased, ought to have been submitted to the jury.

Both classes of evidence were material and important on the contention of the defendant, supported by evidence, that he killed the deceased under the reasonable apprehension that he was about to suffer death or great bodily harm, and have been uniformly held to be competent, when there is evidence of self-defense and the defendant knows of the reputation for violence, and threats have been communicated to him, since *Turpin's case,* 77 N. C., 473, which has been approved twenty-one times.

There is an exception to the charge, which appears to be erroneous on the record, but it is reasonably certain there is some mistake in the transcript, and his Honor is made to use the word "inculpate" for "exculpate."

There must be a
New trial.

STATE v. ALBERT HELMS.

(Filed 11 May, 1921.)

1. **Spirituous Liquors—Intoxicating Liquors—Criminal Law—Possession—Prima Facie Evidence—Questions for Jury.**

The unlawful purpose of sale of spirituous liquors is the offense made indictable by our statutes, whether the indictment be under C. S., 3385 or 3386, and not the possession thereof for lawful purposes, though the possession of the specified quantities is *prima facie* evidence of the illegal purpose, and does not establish a *prima facie* case of guilt. C. S., 3379.

2. **Same—Burden of Proof—Instructions—Appeal and Error—Trials.**

The possession of the specified quantity of spirituous liquor sufficient to make out *prima facie* evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error.

3. **Same—Verdict Directing.**

Where the possession of the specified quantities of intoxicating liquors under our statute, C. S., 3385, has made out *prima facie* evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case.

4. **Trials—Motions—Evidence—Nonsuit—Statutes—Criminal Law.**

A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence, as the statute requires.

5. **Spirituous Liquors—Intoxicating Liquors—Possession—Prima Facie Evidence—Volstead Act—Statutes—Federal Statutes.**

The Volstead Act, title 2, sec. 25, has no application to an action in the State Court wherein the possession of specified quantities of intoxicating liquors under our statutes, C. S., 3385, 3386, makes out *prima facie* evidence of guilt, and an instruction that it made a *prima facie* case sufficient to place the burden on the defendant to establish his innocence is reversible error.

CLARK, C. J., dissenting.

APPEAL by defendant from *Ray, J.*, at the January Term, 1921, of UNION.

The defendant was indicted under a bill which in its first count charged him with the possession of intoxicating liquors for the purpose of selling the same. Its second count was as follows: "Did receive said liquor other than by common carrier, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." He was convicted upon the second count, and from the judgment upon such conviction appealed.

The evidence upon which he was convicted was as follows:

Frank Irby testified: "That he was policeman of the town of Monroe; that he searched the premises of the defendant on 6 November, 1920, in the town of Monroe, under a search warrant; defendant was present and said there was no liquor in his house; found a fruit jar containing some liquor in a closet; defendant said he had a small quantity for his sick baby; found another fruit jar containing small quantity in the same place; found a bottle of liquor under the meal or flour box, and found a jar full in another room on a shelf in some quilts, the house occupied by defendant and his family; found several other vessels that smelt of liquor."

J. W. Spoon, chief of police of Monroe, testified to the same effect.

At the conclusion of the State's evidence, defendant moved for judgment as of nonsuit on count in bill charging unlawful receipt of liquor. Motion was overruled, and defendant excepted.

He then offered the evidence of several witnesses as to his good character. At the conclusion of this evidence he did not renew his motion to nonsuit.

His Honor charged the jury on the second count as follows: "It is provided by law in this State that it shall be unlawful for any person, firm, or corporation, at any one time, or in any one package, to receive in the State of North Carolina for his or her own use, or for any other purpose, or for any other person, firm, or corporation to have in their possession for any other purpose any spirituous, vinous, or malt liquors in greater quantity than one quart, or any malt liquors in greater quantities than five gallons. That the State has to satisfy you beyond a reasonable doubt that the defendant had more than a quart of liquor in his possession.

"If the State has satisfied you beyond a reasonable doubt under the definition which I have given you already of reasonable doubt, and the testimony that it has offered, that the defendant had the liquor in his possession, although it was in different parts of the building, and he inhabited the building it was in, and that the liquor was there belonging to him, the burden of proof being upon the State and the presumption of innocence in favor of the defendant, more than a quart of liquor, then the State has met, as the court charges you, the requirements of law, and made out a *prima facie* case, and then it would devolve the laboring oar upon the defendant to satisfy you, not beyond a reasonable doubt, but to satisfy you that he did not receive the portion of whiskey he had then, slightly over three quarts, that he did not receive this liquor within fifteen consecutive days. That he did not receive it at times when fifteen consecutive days had intervened between the receipt of the first, second, or third quart, that he received it in that way."

(To the foregoing part of his Honor's charge the defendant excepts.)

"If you believe the evidence of the State, have no doubt about it on the second count of the indictment, the presumption being in the defendant's favor and the burden on the State, nothing else appearing, the court instructs you to return a verdict of guilty of receiving whiskey unlawfully, as charged in the bill of indictment."

(To the foregoing part of his Honor's charge defendant excepts.)

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Vann & Milliken for defendant.

ALLEN, J. It cannot be seen from the indictment or the charge of the court whether the defendant is charged with violating sec. 3385 of Consolidated Statutes, which makes it unlawful to receive at one time and in one package more than one quart of spirituous or vinous liquors or intoxicating bitters, or more than five gallons of malt liquors, or under sec. 3386, which prohibits any person, firm, or corporation from receiving during the space of fifteen consecutive days, whether at one time or in one package or not, "any spirituous or vinous liquors or intoxicating bitters in a quantity or quantities totaling more than one quart, or any malt liquors in a quantity greater than five gallons," but under either the instructions to the jury are erroneous and prejudicial to the defendant.

We note the charge, which is not excepted to, that it is unlawful to possess more than certain quantities of intoxicating liquors, for the purpose of correcting a misconception of our statutes. It is not against our law to have in possession liquor, lawfully obtained, for one's own use, but it is indictable to have any quantity in possession for the purpose of sale, and the possession of more than one gallon is *prima facie* evidence of the illegal purpose.

It was also error to charge that proof of the possession of more than one quart of liquor made out a *prima facie* case against the defendant, and if this was a correct statement of the law it was erroneous to give to this *prima facie* case the legal effect of devolving the laboring oar on the defendant to satisfy the jury that he did not receive the liquor within fifteen consecutive days.

The possession of more than one gallon of liquor is made *prima facie* evidence of having it for sale by statute (C. S., 3379), but no such artificial weight is given to the possession of one quart, and such fact is simply a circumstance for the consideration of the jury.

Nor does a *prima facie* case, when legally established, cast the burden on the defendant to satisfy the jury of his innocence. It is sufficient to carry the case to the jury, and upon it alone the jury may, not must, convict, but the burden remains with the State to prove the guilt of the defendant beyond a reasonable doubt.

It was so held in *S. v. Barrett*, 138 N. C., 630, and in the later case of *S. v. Wilkerson*, 164 N. C., 437, which has been frequently affirmed, and in which it is said, "It may, therefore, be taken as settled in this Court, at least, and we believe the same may be said of most, if not all, of the courts, that *prima facie* or presumptive evidence does not, of itself, establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury. The other party may be required to offer some evidence in order to prevent an adverse verdict, or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or he may rely alone upon the facts raising the *prima facie* case against him, and he has the right to have it all considered by the jury, they giving such weight to the presumptive evidence as they may think it should have under the circumstances.

"The defendant is not required to take the laboring oar and to overcome the case of the plaintiff by a preponderance of evidence, is what we said in *Winslow v. Hardwood Co., supra,* and substantially the same thing was said in the other cases we have cited. This is undoubtedly the rule in civil cases, and it applies with the greater force to criminal cases, where the defendant has the benefit of the doctrine of reasonable doubt, and the presumption of innocence." *S. v. Bean,* 175 N. C., 749, affirms the *Wilkinson case,* and is directly in point.

In view of these erroneous instructions, the final direction to the jury, based upon them, was equivalent to directing a verdict, which is not permissible in criminal cases. *S. v. Alley,* 180 N. C., 663.

The motion to nonsuit was not renewed after the introduction of evidence by the defendant, and it cannot therefore be considered. *S. v. Killian,* 173 N. C., 792.

We have not discussed the prohibition amendment or the Volstead Act, because, in our opinion, not pertinent to any question raised by this appeal, but it may not be amiss to say that it would be a strange application of law to hold that a defendant, being tried in the State courts for violating a statute of the State, could be convicted because he had violated a Federal statute, or that giving to the Volstead Act the effect of striking down all provisions of State statutes in conflict with its terms it should have further operation to render a citizen of the State indictable under a State statute, which has had a material part stricken out without the consent of the General Assembly, and which as thus changed has never had the approval of the General Assembly.

It is also well to note that under the Volstead Act, as construed by the Supreme Court of the United States in *Street v. Lincoln Safe Deposit Co.*, decided 8 November, 1920, it is not unlawful *to possess* liquor in one's dwelling, and that it was held in that case that, "Volstead Act, title II, sec. 25, making it unlawful to possess liquor intended for use in violating that act, does not make unlawful possession in a storage warehouse by one who intends to use the liquor in his own home for his family and guests, which is permitted by sec. 33 of the title."

This conclusion was reached upon a construction of sec. 33 of the Volstead Act, which is as follows: "It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein."

New trial.

CLARK, C. J., dissenting: The defendant was indicted in the first count for having in his possession intoxicating liquor for the purpose of unlawful sale, and in the second count in that "He did receive said liquor other than by common carrier, contrary to the form of the statute," etc. The jury returned a verdict of guilty of receiving. The only exceptions besides the refusal of a motion of nonsuit and to set aside the verdict are the following to the charge of the court:

1. "If the State has satisfied you beyond a reasonable doubt under the definition, which I have given you already, of reasonable doubt, by the testimony that it has offered, that the defendant had the liquor in his possession, although it was in different parts of the building, and he inhabited the building it was in, and that the liquor was there belonging

to him, the burden of proof being upon the State and the presumption of innocence in favor of the defendant, more than a quart of liquor, then the State has met, as the court charges you, the requirements of law and made out a *prima facie* case, and then it would devolve the laboring oar upon the defendant to satisfy you, not beyond a reasonable doubt, but to satisfy you that he did not receive the portion of whiskey he had there—slightly over three quarts—that he did not receive this liquor within fifteen consecutive days, that he did not receive it at times when fifteen consecutive days had intervened between the receipt of the first, second, or third quart, that he received it in that way."

2. That the court erred in charging the jury as follows: "If you believe the evidence of the State, have no doubt about it on the second count of the indictment, the presumption being in the defendant's favor, and the burden on the State, nothing else appearing, the court instructs you to return a verdict of guilty of receiving whiskey unlawfully as charged in the bill of indictment."

The defendant offered no evidence whatever except witnesses as to his good character, and he did not renew his motion to nonsuit at the conclusion of the whole testimony, which motion therefore we do not consider. *S. v. Killian,* 173 N. C., 792.

The evidence by the State of the defendant's possession of three quarts and his previous denial of having any when the officers approached the dwelling, was uncontradicted, and the court properly told the jury that if they believed the evidence for the State beyond a reasonable doubt, "the presumption being in the defendant's favor—to return a verdict of receiving whiskey unlawfully as charged in the bill of indictment." *S. v. Fore,* 180 N. C., 744 (*Allen, J.,* for unanimous Court); *S. v. Reed, ante,* 508; *S. v. Pearson, post,* 589, top of page.

There is no charge in the bill in regard to the fifteen days. The statute of North Carolina, 3386, makes it unlawful for "any person, firm, or corporation, during the space of fifteen consecutive days, to receive any spirituous or vinous liquors in a quantity or quantities totaling more than a quart, or any malt liquors in a quantity greater than five gallons." But the Eighteenth Amendment to the United States Constitution provides: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited"; and the Volstead Act, sec. 35, provides: "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

The Supreme Court of the United States, in *Rhode Island v. Palmer*, 253 U. S., 350, said: "The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits."

The Volstead Act, known officially as the "National Prohibition Act," ratified 28 October, 1919, sec. 3, provides: "No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor *except as authorized in this act*, and *all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.*" This being of supreme authority, strikes down any and every provision in any act of Congress or of the Legislature or in the constitution of any state, which modifies or interferes with this provision.

It will thus be seen that this provision being self-executing, eliminates from our statute the authority to receive one quart of spirituous liquors for beverage purposes every fifteen days, but leaves in force the prohibition against receiving it at all.

C. S., 3386, thus amended by the force of the Eighteenth Amendment and the Volstead Act, reads as follows: "It is unlawful for any person, firm, or corporation to receive any spirituous or vinous liquors or intoxicating bitters," etc., subject, of course, to the exceptions provided in the Volstead Act, which, being in other clauses of the act, are, under the settled decisions of the courts, matters of defense which must be set up and proven by the defendant. *S. v. Burton*, 138 N. C., 578, and cases there cited and citations thereto in Anno. Ed.

The evidence in this case, as recited to the jury in the charge of the court and sent up as a part of the record, is as follows: "That on 6 November, 1920, at the defendant's home here in Monroe, a search warrant was taken by Mr. Frank Irby and J. W. Spoon, chief of police, who searched the defendant's premises; when they approached his dwelling they asked him if he had any whiskey in his possession, and he declared he did not have anything; they proceeded with the search and found in one room a portion of whiskey in a cupboard, in a second they found another portion of whiskey between two quilts; in the cook room they found a bottle of whiskey in the flour bin under the dough board, it being concealed; when they found the first whiskey they asked the defendant what he had that for, and he said he had it for the baby; there were four different receptacles of liquor found; two fruit jars with a quart in each, which have been offered in evidence and which you have seen. One fruit jar full of whiskey—they being half-gallon jars—and a pint bottle full of whiskey."

C. S., 3385, makes it unlawful for any one, "at any one time or in any one package, to receive" in this State for his use or for the use of any one, "or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart." So far there is no conflict with the Volstead Act, except limiting the quantity to one quart, which makes no difference here, as the defendant had more than that quantity, and the Volstead Act strikes out the limitation "at any one time or in any one package." The other provision in C. S., 3386, limiting the unlawfulness to cases only where such quantity has been received "during the space of 15 consecutive days," is also a modification and restriction upon the Volstead Act, and is therefore stricken out by virtue of that act enacted under the authority of the Eighteenth Amendment.

There are numerous authorities in our State which make restrictions (when valid) a defense which should be set up and proven by the defendant. *S. v. Burton,* 138 N. C., 578; *S. v. Blackley, ib.,* 622; *S. v. Connor,* 142 N. C., 701, 702; *S. v. Long,* 143 N. C., 674, and many other cases.

However, it is not necessary to discuss this proposition for the power of the Federal Government as expressed in the Volstead Act enacted under the Eighteenth Amendment strikes out the modification which makes the receipt of a quart not unlawful "if extended over a period of more than 15 days."

It devolved upon the defendant to set up as a defense and prove that the receipt and possession of the liquor found in his possession comes under some one of the exceptions provided in the Volstead Act. This the defendant did not attempt to show. The sole evidence offered in his behalf was as to his good character, as to which the court instructed the jury without any exception from the defendant.

The charge of the court in regard to the 15 days limitation, even if erroneous, was therefore absolutely surplusage and immaterial. It was an error in favor of the defendant. The bare, uncontradicted evidence in this case is that the defendant was found in possession of more than three quarts of liquor, that he denied it until it was found, on a search of his house, and he has offered no evidence to bring himself under the exception in the Volstead Act which would have justified his possession. The jury found the evidence for the State to be true beyond all reasonable doubt, and indeed the defendant did not contradict it, and the law made that fact unlawful.

The State could not enact any valid statutory provision which would make legal the possession of liquor under circumstances not coming within the exceptions in the Volstead Act, and that act struck out any such provision which was in any statute, State or Federal, prior to the commission by the defendant of this offense.

The United States Supreme Court has held that the Fifteenth Amendment was self-executing, and struck out, *ex propio vigore,* any statute or constitutional provision in conflict therewith. *Guinn v. U. S.*, 238 U. S., 347; *Myers v. Anderson, ib.*, 369; *U. S. v. Mosley, ib.*, 383; and it has held the same as to the Eighteenth Amendment, *Rhode Island v. Palmer,* 253 U. S., 350 (both of which amendments were ratified by this State), and we have recognized the same effect as to the Ninteenth Amendment, which this State did not ratify, by the admission of women to suffrage. When the supreme power has spoken it is not necessary to wait for any state to modify its statutes to conform. The conflicting provision in any statute, State or Federal, is automatically stricken out.

Under the State statute, as amended by the Federal statute, striking out the modifying clause of 15 days given the defendant in which to receive a quart, the defendant was clearly guilty, and there was no error in the charge of which he had the right to complain.

STATE v. O. W. KERNER.

(Filed 11 May, 1921.)

1. **Constitutional Law—Criminal Law—Statutes—Weapons—Arms—Unconcealed Weapons.**

   A statute making the carrying of a weapon, specifying pistols, among other things, from the premises unconcealed, a misdemeanor and punishable the same as if carried concealed, unless a permit be first obtained upon a statement of the purpose for which it was to be carried, the payment of a $5 license fee and the giving of a $500 bond, exceeds the legislative power of police regulation and is in violation of the declaration of rights in our State Constitution, that "The right of the people to keep and bear arms shall not be infringed," with proviso that "nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting statutes against said practice." Const., Art. I, sec. 24. *Semble*, a pistol is included in the word "arms" *ex vi termini.*

2. **Same—Questions of Law—Trials—Case Agreed.**

   Where it appears from a special verdict that the defendant was tried for carrying an unconcealed weapon, made a misdemeanor under a public-local statute; that he had been accosted on the street of a town by one who desired to bring about a fight, and that the defendant then put down some packages he was carrying and went to his store and returned with a pistol, carrying it openly: *Held*, the offense created by the statute was unconstitutional, and a conviction thereunder could not be sustained, as a matter of law.

WALKER, J., concurring in result; ALLEN, J., concurring; STACY, J., concurring in opinion of ALLEN, J.

APPEAL by State from *Webb, J.*, at January Term, 1921, of FORSYTH.

The defendant was indicted on a first count for carrying a concealed weapon, and on the second count for carrying a pistol off his premises unconcealed. There was a special verdict, which found the defendant was walking along the streets of the town of Kernersville in Forsyth County carrying some packages, when he was accosted, for the purpose of engaging him in a fight, by one Matthews; that in the course of this altercation he set down his packages and went to his place of business and there procured a pistol, which he brought back with him unconcealed to the scene of the altercation. Sec. 3, ch. 317, Public-Local Laws 1919, prohibits the carrying of such weapons off his own premises by any one in Forsyth without a permit, even though it was not concealed. The court, being of the opinion that this statute was in conflict with the constitutional provision that "the right to bear arms shall not be infringed," directed a verdict of not guilty, and the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Jones & Clement for defendant.

CLARK, C. J. The second amendment to the United States Constitution, which provides that "the right of the people to keep and bear arms shall not be infringed," does not apply, for it has been repeatedly held by the United States Supreme Court and by this Court, and, indeed, by all courts, that the first ten amendments to the United States Constitution are restrictions upon the Federal authority and not upon the states. *In re Briggs,* 135 N. C., 120; *S. v. Patterson,* 134 N. C., 617; *S. v. Newsom,* 27 N. C., 250; *U. S. v. Cruikshank,* 92 U. S., 542; 9 Rose's Notes (Rev. Ed.), 152.

The Constitution of this State, sec. 24, Art. I, which is entitled, "Declaration of Rights," provides: "The right of the people to keep and bear arms shall not be infringed," adding, "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice." This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further. This constitutional guarantee was construed in *S. v. Speller,* 86 N. C., 697, in which it was held that the distinction was between the "right to keep and bear arms," and the "practice of carrying concealed weapons." The former is a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves. The provision against carrying them concealed was to prevent assassinations or advantages taken by the lawless, *i. e.,* against the abuse of the privilege.

This provision of the Constitution has also been cited and discussed in *S. v. Reams,* 121 N. C., 556; and in *S. v. Boone,* 132 N. C., 1108.

Chapter 317, Public-Local Laws 1919, applicable only to Forsyth County, provides: Section 1 prohibits the carrying of concealed weapons; section 2 requires a permit, and section 3 provides: "If any person, except when on his own premises, shall carry any weapon (named in section 1) without a permit (as provided in section 2) he is guilty of a misdemeanor and punished as provided in section 1 for carrying a concealed weapon." The weapons named in section 1 include pistols, and the question as presented is whether this conflicts with the constitutional provisions above cited.

The other weapons recited in section 1 of this act, besides "pistol," are, "bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knucks, or razor, or other deadly weapon of like kind." None of these, except "pistol," can be construed as coming within the meaning of the word "arms" used in the constitutional guarantee of the right to bear arms. We are of the opinion, however, that "pistol" *ex vi termini* is properly included within the word "arms," and that the right to bear such arms unconcealed cannot be infringed. The historical use of pistols as "arms" of offense and defense is beyond controversy.

It is true that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gasses, and of aeroplanes carrying bombs and other modern devices have much reduced the importance of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to "bear," and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.

It would be mockery to say that the Constitution intended to guarantee him the right to practice dropping bombs from a flying machine, to operate a cannon throwing missiles perhaps for a hundred miles or more, or to practice in the use of deadly gasses. In Cooley Const. Lim., the history and the intention of this provision is thus set forth: "Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. A standing army is peculiarly obnoxious in any free government, and the jealousy of such an army has at times been so strongly manifested in England as to lead to the belief that even though recruited from among themselves, it was more dreaded by the people as an instrument of oppression than a tyrannical monarch or any foreign power. So impatient did the English people become of the very army that liberated them from the tyranny of James II that they demanded its reduction even before the liberation became complete; and to this day the British Parliament render a standing army practically impossible by only passing a mutiny act from session to session. The alternative to a standing army is "a well-regulated militia"; but this cannot exist unless the people are trained to bearing arms. The Federal and State constitutions, therefore, provide "that the right of the people to bear arms shall not be infringed."

We know that in the past this privilege was guaranteed for the sacred purpose of enabling the people to protect themselves against invasions of their liberties. Had not the people of the Colonies been accustomed to bear arms, and acquire effective skill in their use, the scene at Lexington in 1775 would have had a different result, and when "the embattled farmers fired the shot that was heard around the world" it would have been fired in vain. Had not the common people, the rank and file, those who "bore the burden of the battle" during our great Revolution, been accustomed to the use of arms the victories for liberty would not have been won and American Independence would have been an impossibility.

If our pioneers had not been accustomed to the use of arms the Indians could not have been driven back, and the French, and later the British, would have obtained possession of the valley of the Ohio and the Mississippi. If the frontiersmen had not been good riflemen, particularly the riflemen from Tennessee and Kentucky, the battle of New Orleans would have been lost and the frontiers of this country would have stood still at the Mississippi.

In our own State, in 1870, when Kirk's militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation.

The maintenance of the right to bear arms is a most essential one to every free people, and should not be whittled down by technical constructions. It should be construed to include all such "arms" as were in common use, and borne by the people when this provision was adopted. It does not guarantee on the one hand that the people have the futile right to use submarines and cannon of 100 miles range, nor aeroplanes dropping deadly bombs, nor the use of poisonous gasses, nor on the other hand does it embrace dirks, daggers, slung-shots, and brass knuckles, which may be weapons, but are not, strictly speaking, "arms" borne by the people at large, and which are generally carried concealed. The practical and safe construction is that which must have been in the minds of those who framed our organic law. The intention was to embrace the "arms," an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols. These are now but little used in war, still they are such weapons that they or their like can still be considered as "arms," which they have a right to "bear."

It is dangerous to minimize these guarantees, based upon the wisdom of the ages, which have been imbedded in our organic law. It has been well said that when the word weapon is used in a statute it denotes fire-arms, which includes pistols, but does not embrace brass knuckles, slung-shots, or weapons of like description. 40 Cyc., 852, and cases there cited: *State v. Buzzard,* 4 Ark., 18; *English v. State,* 35 Tex., 473. This distinction is upheld in *Aymette v. State,* 21 Tenn. (2 Humphreys), 155; *Andrews v. State,* 3 Heis (Tenn.), 165; *State v. Wilburn,* 66 Tenn. (7 Baxter), 57; *Wilson v. State,* 33 Ark., 557; *Nunn v. Georgia,* 1 Kelly (Geo.), 243; *Stockdale v. Georgia,* 32 Ga., 225.

It would also be a reasonable regulation, and not an infringement of the right to bear arms, to prohibit the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror, which was forbidden at common law. These from a practical standpoint are mere regulations, and would not infringe upon the object of the constitutional guarantee, which is to preserve to the people the right to acquire and retain a practical knowledge of the use of fire-arms. *S. v. Shelby,* 90 Mo., 302.

It is also but a reasonable regulation, and one which has been adopted in some of the states, to require that a pistol shall not be under a certain length, which, if reasonable, will prevent the use of pistols of small size, which are not borne as arms, but which are easily and ordinarily carried concealed. To exclude all pistols, however, is not a regulation, but a prohibition, of arms, which come under the designation of "arms" which the people are entitled to bear. This is not an idle or an obsolete guarantee, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations. Should there be a mob, is it possible that law-abiding citizens could not assemble with their pistols carried openly and protect their persons and their property from unlawful violence without going before an official and obtaining license and giving bond?

The usual method when a country is overborne by force is to "disarm" the people. It is to prevent the above and similar exercises of arbitrary power that the people in creating this Government "of the people, by the people, and for the people," reserved to themselves the right to "bear arms" that accustomed to their use they might be ready to meet illegal force with legal force by adequate and just defense of their persons, their property, and their liberties, whenever necessary. We should be slow, indeed, to construe such guarantee into a mere academic expression which has become obsolete.

We can have no knowledge of the future except by the past, or as Patrick Henry said, "The only light by which our feet are guided is the lamp of experience." The constitutional provision which forbids any prohibition upon the people to bear arms and use them effectively by being accustomed to their use should be strictly and stoutly maintained, for we know not when the occasion may again require the assertion of that doctrine which was one familiar throughout this country that, "Resistance to tyranny is obedience to God," or the defense of person and property against mobs and violence.

The statute in this case, Public-Local Laws 1919, ch. 317, is especially objectionable in that it requires (sec. 2) that in order to carry a pistol off his own premises, even openly, and for a lawful purpose, the citizen must make application to the municipal court, if a resident of a town; or to the Superior Court if not residing in town, "describing the weapon and giving the time and purpose for which it may be carried off his premises, and must pay to the clerk of the court the sum of $5 for each permit, and must file a bond in the penalty of $500 that he will not carry the weapon except as so authorized." In the case of a riot or mob violence, or other emergency requiring the defense of public order, this would place law-abiding citizens entirely at the mercy of the lawless element. As a regulation, even, this is void because an unreasonable regulation, and, besides, it would be void because for all practical purposes it is a prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit and to give such bonds on an emergency.

On this occasion, the defendant, threatened with violence, was forced to abandon his property. He went to his place of business, where he had the right to keep his pistol, "being on his own premises," and returned with it unconcealed. He was acting in self-defense of his person and in defense of his property. The court below most properly adjudged, upon the special verdict, that he was not guilty.

No error.

WALKER, J., concurring in result.

ALLEN, J., concurring: The right to bear arms, which is protected and safeguarded by the Federal and State constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.

This is, I think, the correct principle, and it appears to me the constitutional privilege is infringed by the act, under which the defendant is indicted, as it makes one guilty of a violation of law, who carries a pistol off his own premises openly and for a lawful purpose without a permit, and he is required to pay $5 and to give a bond in the sum of $500 before the permit can issue.

No provision is made for an emergency, and no exception in favor of one who carries a pistol off his premises openly, in the necessary defense of his person or property, when he has had no opportunity to secure a permit.

STACY, J., concurs in this opinion.

STATE v. JIM GETTYS ET AL.

(Filed 18 May, 1921.)

1. **Statutes—General Laws—Special Acts—Repeal—Drainage Districts.**

Where a special local statute for the formation and operation of a drainage district is complete in itself in all its details, a general law expressing itself applicable to all such drainage districts in the State, adding further duties and making the failure of the commissioners to file certain reports an indictable offense, C. S., 5374, 5375, will not be construed to apply unless special reference is made to the special local act.

2. **Same—Consolidated Statutes.**

The Consolidated Statutes were compiled under authority of ch. 252, Laws 1917, for "collecting and revising the public statutes of the State," and unless specifically referred to, a private local statute, complete in itself, is not affected unless specifically mentioned therein.

3. **Same.**

Where a public-local law is complete in all of its details in establishing and maintaining a special drainage district, and requires the commissioners to keep "a perfect record of all dealings and transactions," this record is subject to inspection by all interested in the district; and C. S., 5374-5, subsequently enacted, which, among other things, makes it an indictable offense for the failure of the commissioners to make certain reports and to publish them, has no application, especially as C. S., 5381, provides that the subchapter on Drainage Districts "shall not repeal or change local drainage laws already enacted."

CLARK, C. J., dissenting; STACY, J., concurring in the dissenting opinion.

APPEAL by plaintiff from *Lane, J.*, at the February Special Term, 1921, of BURKE.

This is an indictment against the defendants, as commissioners of Muddy Creek Drainage District, for failure to file certain reports and to publish the same as required by secs. 5374 and 5375 of the Consolidated Statutes.

The drainage district was formed and organized under chapter 348, Public-Local Laws 1913.

A motion to quash the indictment was allowed, and the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Avery & Ervin for defendants.

ALLEN, J. It is made the duty, by secs. 5374 and 5375 of Consolidated Statutes, "of the commissioners of all drainage districts organized under the provisions" of the laws of North Carolina to file and publish the statements of receipts and expenditures set out in the indictment, and a failure to do so is indictable under sec. 5376.

This language of the statute, saying, as it does, "commissioners of all drainage districts," is sufficiently broad and comprehensive to include commissioners of all drainage districts organized under special acts, but the language must be understood and construed in connection with the subjects then under consideration by the General Assembly.

The Consolidated Statutes was authorized by chapter 252, Laws 1917, to provide "for the compiling, collating, and revising of the public statutes of the State of North Carolina," and unless mentioned expressly or by necessary implication it was not the purpose of the Legislature to deal with special or private acts.

In the compilation of the statutes, chapter 94, covering fifty-four pages, is devoted to State drainage laws, under which drainage districts may be established in any part of the State, and the sections under which the defendants are indicted are a part of this chapter.

The natural and reasonable inference from these considerations is that "commissioners of all drainage districts" refers to the subjects then being regulated—districts formed under the general law—and that there was no purpose to change or deal with districts formed under special acts, and this follows a well established rule of construction.

"It is a canon of statutory construction that a later statute, general, in its terms and not expressly repealing a prior statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. . . . 'And the reason is,' said Wood, V. C., in *Fitzgerald v. Champenys,* 30 L. J. Ch. N. S., 782; 2 Johns. & H., 31-54, 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'

"In Black on Interpretation of Laws, 116, the proposition is thus stated: 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule: 'The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'

"And in *Crane v. Reeder,* 22 Mich., 322, 334, *Mr. Justice Christiancy,* speaking for the Supreme Court of that state, said: 'Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict.'"

These quotations are taken from *Rodgers v. U. S.,* 185 U. S., 83, and the Court adds: "Both the text-books and the opinion just quoted cite many supporting authorities."

This rule is peculiarly applicable to chapter 348, Public-Local Laws 1913, under which the Muddy Creek District was organized, which is complete within itself, providing in detail for the organization of the commission, laying out of canals, surveys, assessments, etc., and the commissioners are specially required to procure books in which shall be kept "a perfect record of all dealings and transactions" of the commission or corporation, which would, of course, be subject to inspection by all interested in the district, and would furnish all the information that could be obtained from the statements referred to in C. S., 5374-5.

We are, therefore, of opinion the general law was not intended to affect the special statute, but if the question was doubtful, it is put at rest by sec. 5381, a part of the same subchapter of the general drainage law, which provides, "This subchapter shall not repeal or change any local drainage laws already enacted."

That secs. 5374 and 5375 would change the special act, if permitted to affect it at all, is clear, since they would impose additional duties on the commissioners, and make them liable criminally for failure to perform them.

An authority very much in point is *S. v. Womble,* 112 N. C., 862, in which it was held that an exemption of certain employees of a railroad from working the roads, contained in the act incorporating the company: "Such exemption, being contained in a private act, is not repealed by sec. 2017 of The Code, which required all able-bodied male persons between the ages of eighteen and forty-five to work on the public roads, since by sec. 3873 of The Code it is provided that 'no act of a private or local nature shall be construed to be repealed by any section of this Code.'"

In any aspect of the case, the indictment was properly quashed.

Affirmed.

CLARK, C. J., dissenting: C. S., 5374, establishes a system of supervision and reports required from "*all* drainage districts." The language of C. S., 5374, is: "It shall be the duty of the commissioners of all drainage districts in the State of North Carolina, organized under the provisions of the laws thereof, to file with the clerk of the Superior Court in the county where such district is organized a monthly statement of account," etc.; and 5375 requires the same duty from "the board of commissioners of *all* drainage districts in the State of North Carolina," to file an annual report; and 5376 provides an indictment and penalty "for any board of commissioners for any drainage district in this State for failure to file such statement."

The defendants are indicted for failure to obey this general law. The defense set up is that the defendants, commissioners of the Muddy Creek Drainage Commission, were incorporated under the Public-Local Laws 1913, ch. 348, but it will be seen that the act above cited applies to "all drainage districts." The defendants contend, however, that they are exempt because C. S., 5381, provides: "This subchapter shall not repeal or change local drainage laws already enacted"; but these provisions,

C. S., 5374, 5375, 5376, providing for supervision, control, and publicity as to drainage districts in requiring reports formulate a state-wide measure applying to "all drainage districts in the State," and, moreover, they do not repeal or change in any way the charter of the defendant, which was enacted in 1913. If the act of 1913 had provided specially that it should be exempted from this general police regulation, state-wide in its nature, then it might have been contended that this general act repealed or modified the special act; but it did not do so for the reason that it repealed or changed nothing in the charter of the defendant company, but merely extended to it the supervision of the general police regulation applying to all drainage districts in the State without any exception. There is no indication of any intention to exempt any drainage district from this general statute, and there appears no reason why this defendant should be exempted. The terms of the statute are broad enough to include every drainage district in the State, whether organized under general law or special law, nor can we attach any importance to the fact that the statute of 1917, now C. S., 5374, *et sequitur,* is placed in the chapter entitled "Drainage." The commission to revise the laws was authorized to "distribute the various statutes under such titles and divisions as may to them seem proper," and the location by them of any statute could not possibly affect its meaning or limit its scope.

Nor is there any force in the other grounds urged by the defendant. The statute itself makes the failure to file these reports a misdemeanor, punishable in the discretion of the court which places it within the jurisdiction of the Superior Court. This was enacted four years after the incorporation of the defendant, Muddy Creek Drainage District.

The plain requirement of the law and its evident intention were uniformity and the application of the requirement to "all drainage districts in the State"; and the motion to quash should have been denied.

STACY, J., concurs in dissent.

STATE v. E. B. McCOLLUM.

(Filed 18 May, 1921.)

Indictment—Courts—Omission of Name of Accused—Arrest of Judgment —Supreme Court—Appeal and Error.

Each count in a bill of indictment should be complete in itself, and some name therein be given the defendant, and if no name appears in the bill or in the only count in which a conviction is had, the charge is fatally defective, and the judgment must be arrested, and this will be done though presented for the first time in the Supreme Court, on appeal.

APPEAL by defendant from *Bryson, J.*, at the January Term, 1921, of MONTGOMERY.

The indictment is for violation of prohibition laws of State, and contains five counts, and the case on appeal states that defendant was acquitted on all of the counts except the count which charged receipt of more than a quart within fifteen days, this being the fourth count in the bill.

There was judgment that defendant be imprisoned for nine months, and assigned to work on the roads of Rowan County. From which judgment defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. T. Poole for defendant.

HOKE, J. The record shows that the count on which the jury rendered a verdict does not contain the name of the defendant, or any name whatever. It is very generally held in an indictment consisting of several counts that each count should be complete in itself, and that in order to this some name should be given the defendant. If it is the wrong name, or defectively stated, the question should ordinarily be raised by plea in abatement or motion to quash, but where no name at all appears in the bill or in the only count on which a conviction is had, it is held in this jurisdiction that such a charge is fatally defective, and the judgment must be arrested. *S. v. Anderson Phelps,* 65 N. C., 450. And this course should be taken though the question is presented for the first time in the Supreme Court on appeal. *S. v. Lumber Co.,* 109 N. C., 860; *S. v. Caldwell,* 112 N. C., 854; *S. v. Goings,* 98 N. C., 766.

This will be certified that the judgment on the present conviction be arrested.

Reversed.

STATE v. FRANK PARRIS.

(Filed 25 May, 1921.)

1. **Spirituous Liquor—Principal and Agent—Accessories—Misdemeanors.**

In the commission of a misdemeanor, both the principal and the agent through whom the offense was committed are held to the same degree of guilt, both being regarded as principals therein for the purpose of conviction.

2. **Same—Evidence—Defendant's Identity—Instructions.**

Where there is sufficient evidence to convict the defendant of the unlawful sale of spirituous liquor, and also to establish his defense of an alibi, with further evidence of the unlawful and customary sale at his residence by one who resembled him, an instruction by the court to the jury is not erroneous, that if the State had satisfied them beyond a reasonable doubt that the defendant had put liquor there for the purpose of selling it, and some one else was selling it with his consent and authority, the defendant would be guilty.

3. Spirituous Liquors—Verdict—Polling Jurors—Appeal and Error.

Semble, under the facts of this case, upon a trial of defendant for unlawfully selling intoxicating liquors, there being evidence that the defendant made the sale himself, or through another acting for him, the verdict of the jury of guilty makes it doubtful as to which fact was found by them, that could have been ascertained by polling the jury and obviated the necessity of the appeal.

APPEAL by defendant from *Harding, J.*, at September Special Term, 1920, of HENDERSON.

Criminal prosecution, charging the defendant with selling spirituous and intoxicating liquors to one William Thomas.

There were facts in evidence tending to show that the defendant lived in the country, on the Howard Gap road, not far from Hendersonville; that the prosecuting witness, in company with others, went to the home of the defendant on 22 December, 1919, and purchased from him two quarts of whiskey, paying the sum of $5 therefor. Other sales were made on the same day. Thomas testified: "There were a lot of men there when I got the liquor; don't know how many; did not count them; seems to me like about five or six men. I know that is the man (defendant) I got the two quarts of whiskey from."

There was further evidence tending to show that J. Parris, father of defendant, lived with his son, and that the two "look very much alike, the old man's hair is still dark, a youthful looking man to be this defendant's father."

The defendant offered evidence tending to show that he was in South Carolina at the time of the alleged sale. His evidence, if believed, was sufficient to establish an *alibi*.

The following portion of his Honor's charge is the basis of the defendant's only exception: "If the State has failed to satisfy you, beyond a reasonable doubt, that the defendant was there in person himself, that he was off somewhere else, but if the State has satisfied you beyond a reasonable doubt that this defendant put liquor there, for the purpose of selling it, in his home, and that with his consent and his authority, somebody was there selling liquor and selling his liquor to these witnesses, he would be just as guilty, under the law, as if he were there in person dealing it out himself; if the State has satisfied you beyond a reasonable doubt that this defendant had liquor there, and had somebody there to act in his stead to sell the liquor, and if the State has satisfied you beyond a reasonable doubt that he actually did sell to this witness he would be guilty, and it would be your duty to convict him."

From a verdict of guilty, and judgment thereon, defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Smith & Arledge for defendant.

STACY, J. The State's evidence, if believed, showed conclusively a sale by the defendant to the prosecuting witness, William Thomas. Conversely, the defendant's evidence, if believed, established conclusively an alibi on behalf of the defendant. The jury might have accepted either view of the evidence, but the appeal presents the question as to whether, upon the record, a conviction of a sale through an agent can be sustained. There was a suggestion that the sale may have been made by J. Parris, the defendant's father.

The prosecuting witness, and others, purchased liquor at the defendant's house on the same day. There were five or six men present at the time this took place at a private home in the country. Considering the entire evidence, we think it sufficient to be submitted to the jury, and to warrant a verdict of guilty.

In *S. v. Winner*, 153 N. C., 602, there was evidence tending to show a sale in defendant's place of business by means of a dumb waiter. The purchaser made known his presence and his thirst, a tin cup appeared in a hole in the wall, money was placed in it, the cup disappeared and a bottle of whiskey appeared in a few seconds. Testimony of a similar transaction was offered in corroboration. This evidence was held to be sufficient to warrant a conviction, though it did not appear that the defendant was present at the time.

A principal is *prima facie* liable for the acts of his agent, and one who aids and abets another in the commission of a misdemeanor is held to the same degree of guilt as a principal, because in misdemeanors all concerned are principals. *S. v. Kittelle,* 110 N. C., 560.

The question of a sale through an agent, in the instant case, may not have been considered by the jury at all, as there was ample evidence tending to show that the defendant was present and made the sale himself. This could have been determined by polling the jury; and, in all probability, the appeal would have been obviated had the defendant requested that such be done.

No error.

STATE v. HENRY PEARSON.

(Filed 25 May, 1921.)

1. **Appeal and Error—Brief—Exceptions Abandoned—Objections and Exceptions.**

   Exceptions not brought forward in appellant's brief are taken as abandoned. Rule of Supreme Court 34. (174 N. C., 837.)

2. **Evidence—Character—Truth and Veracity.**

   A witness as to character can only be questioned as to the general character of the defendant in a criminal action, and not as to his character for truth, unless the defendant has gone upon the stand in his own behalf, and the State has offered evidence for the purpose of impeaching his testimony as not being the truth. *S. v. Foster*, 130 N. C., 675, cited and distinguished.

3. **Appeal and Error—Instructions—Contentions—Criminal Law.**

   Exception to the statement made by the judge of the contention of a party is not ordinarily reviewable on appeal, especially if appellant has not excepted to the evidence upon which it was based.

4. **Intoxicating Liquors—Spirituous Liquors—Instructions.**

   Where there is direct evidence of the unlawful sale of spirituous liquors by the defendant, or his keeping it for sale, under indictment therefor an instruction for the jury to find him guilty if they were so satisfied beyond a reasonable doubt is not erroneous.

APPEAL by defendant from *McElroy, J.*, at January Term, 1921, of BUNCOMBE.

The defendant was found guilty on two counts: first, for selling liquor, and second, for keeping liquor on hand for sale, in violation of prohibition laws. Verdict of guilty, sentence, and appeal.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wright & Craig for defendant.

CLARK, C. J. Todd, witness for the State, testified that on 7 November, 1920, he purchased one pint of liquor from the defendant for $6 at his restaurant in Asheville, and that at other times since 1913 he had purchased drinks from him. He testified also that the defendant kept the liquor in a five or ten gallon can and in a coffee pot. Jarrell, another witness for the State, testified that he had purchased the liquor which was exhibited in evidence for the witness Todd, who gave him $6 which he paid for it. Shaw, another witness, testified that he was present when the liquor was handed to the witness Jarrell. Here the State rested, and the defendant moved for judgment of nonsuit, which was denied, the court remarking to the counsel that he would have to charge the jury if they believed the evidence to find the defendant guilty, to which the defendant excepted. There was no error in this statement upon the evidence then before the court. The defendant then testified in his own behalf that he did not sell any liquor to Todd, and that he never had any liquor for sale in a coffee pot or in a five or ten gallon can.

There was evidence from some of the defendant's witnesses that he was a man of good character, and others gave him not so good a character. The defendant excepted because the court refused to permit two of the defendant's witnesses to answer the question, "Do you know defendant's character for truth and veracity?" These two exceptions were abandoned, not being brought forward in defendant's brief. Rule 34 of this Court (174 N. C., 837), provides: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." The exception, however, could not have been sustained, if insisted on, for the rule is well settled that the party introducing a witness as to character, "can only interrogate him as to the general character of such person"; *S. v. Hairston,* 121 N. C., 582, citing *S. v. Daniel,* 87 N. C., 507; *S. v. Laxton,* 76 N. C., 216. The counsel, in making these exceptions, was probably misled by what was said in *S. v. Foster,* 130 N. C., 675, that "when the defendant has gone upon the stand in his own behalf it is competent to prove his general character for truth," but the context shows that this arose upon evidence for the State to impeach his character as is shown by the citation of *S. v. Traylor,* 121 N. C., 674.

Exception 5 was simply a statement by the judge of a contention by the State; besides, the defendant did not object to the admission of the evidence upon which the contention was based.

Exception 6 was because the court charged the jury: "If the State has satisfied you beyond a reasonable doubt that at the time named, the defendant in this case delivered to the witness, James Todd, a pint of spirituous liquors, and that the witness paid him therefor the sum of $6, then the court charges you that the defendant is guilty of selling spiritous liquors, and it is your duty to return a verdict of guilty."

The seventh exception is to the following charge: "If, from all the evidence, you are satisfied beyond a reasonable doubt that the defendant kept spiritous liquors on hand for the purpose of sale, then it is your duty to return a verdict of guilty."

In these particulars we find no error. The other exceptions are formal, to the denial of a motion for a new trial; and to the judgment.

No error.

STATE v. W. Y. WESTMORELAND.

(Filed 25 May, 1921.)

1. **Appeal and Error—Objections and Exceptions—Contentions of Parties.**

   Exceptions to the statement by the judge to the jury of appellant's contentions taken after the rendition of the judgment adversely to him and in his statement of the case on appeal does not afford the trial judge an opportunity to correct the error, if any, he has made therein, and they will not be considered in the Supreme Court on appeal.

2. **Homicide— Murder— Evidence—Corroborating Circumstances—Clothing.**

   Where the defense upon a trial for a homicide contends that another person with him at the time committed the crime, and there is evidence to convict the accused, it is competent to show the clothing worn at the time by such other person in corroboration of the State's evidence that tended to show the companion of the prisoner could not have carried his pistol in his hip pocket as the accused contended, as the clothes he was then wearing had no hip pocket in them.

3. **Homicide—Murder—Premeditation—Evidence—Preconceived Intent—Deliberation.**

   Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree.

4. **Homicide—Murder—Intent—Robbery—Evidence—Statutes.**

   Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by C. S., 4200, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree.

APPEAL by defendant from *Bryson, J.*, at the January Term, 1921, of IREDELL.

This is an indictment against the prisoner for the murder of J. H. Nance, which the State alleges was committed under the circumstances detailed in the testimony of its witness, Ivey Sims, the substance of which is hereinafter set forth.

The State's witness, Ivey Sims, and the defendant, W. Y. Westmoreland, were in Statesville on the night of 20 October, arriving there about 11 o'clock. The defendant persuaded Sims to go with him to his home, which was below Troutman's, in Iredell County, telling him that he, Westmoreland, would hire a car and take him out there to spend the night, and would come back in time in the morning to take a train for

Landis, where the witness Sims resided. Westmoreland did hire the deceased, Nance, to take them out. A man named Alley went with them as far as Troutman. After Alley had left the car they drove on to Westmoreland's home, and the following occurred, according to the testimony of Ivey Sims: "Just before he got to the house, I could see the bulk of the house, and the car driver asked Mr. Westmoreland, 'Is here where you live?' and Westmoreland said 'Yes.' The car stopped in front of Mr. Westmoreland's home, right at the gate. When he drove up Mr. Westmoreland started to get out, and I started to get out right behind him, thinking he was going to pay the man, and let him go back to town, and he said, 'You and the car driver stay here until I go in the house and see if there is any one at home.' The car driver got out and measured his gas, and he said, 'I have more gas than I thought I had.' He said, 'I didn't think I had but a gallon, but I have two gallons.' He got back up in his car and set down under the steering wheel, where he sat to drive his car. At that time I was in the back seat, sitting right behind the driver, where I sat coming down. I laid down in the back seat. I got sorter chilly driving down there, and had dozed off in a sleep, and he waked me up when he come back to the car—Mr. Westmoreland speaking to the car driver. He said, 'Why the man in the back seat is about to go to sleep,' and the car driver turned his head like. The car driver said, 'Yes; I believe he is,' and didn't more than say 'Yes; I believe he is,' until the pistol fired. I raised in the back seat and said, 'What in the world is the matter, Mr. Westmoreland?' He had the gun up that way (illustrating), and cut his eye over toward me, and never spoke, and leveled his gun and shot the man in the head again. I did not see the first shot fired. I heard it. That woke me up. I raised up then. When he fired his second shot the driver was sitting in his car in that position (illustrating) like he was looking down into the foot of the car. That was the second shot. I then stepped out of the car on the opposite side from where Mr. Westmoreland was standing. I stopped there side of it and was scared so bad I didn't know what to do or what to say, or what to think; and he said, after he shot him, 'That is what I have been wanting to do for a long time.' He was sticking his gun back in his pocket and gave me orders to get up in the car and pull the man over the front seat, and he stepped up in the front seat, and I stepped up in the back seat, and was slow about taking hold, and he told me again, he said, 'Take hold and let's get him in the back seat,' and he caught hold of the man under his legs that way (illustrating), and lifted him up, and some change fell out of his pocket, and he went through his pants' pockets and searched them. I don't know how much money he got, anyway, he got some, and stuck it in his pocket, and he found a gun on the seat or in the man's pocket one, and he said, 'That is what he has been toting for me,' and stuck it in his hip pocket, and he said, 'Pull up on the man,' and I pulled up, and he lifted him, and we had him laying over the car something like that (indicating), and he gave him a throw, and throwed his legs in the foot of the car. I had to jump up on the back seat to keep him from falling on me, and he stepped out of the car and pushed his feet up in the car and shut the door, and said to me, 'You get in the front seat here and ride with me.' I stepped out of the car and got in the front seat with him, and he cut the car around and started back up the road, where he come in toward the main road, and I said to him after he started, 'What in the world are you going to do with the man, Mr. Westmoreland?' He said, 'You keep your mouth shut and don't you say anything.'"

The prisoner denied that he killed Nance, and alleged and testified that Ivey Sims was the guilty party. We need not state any more of the testimony, as it is only necessary to show that there was evidence on the part of the State to support the verdict, as we are not weighing it, that being the province of the jury.

The prisoner was convicted of murder in the first degree, and from the judgment appealed to this Court. The prisoner assigned fifteen errors, the first three were abandoned, the fourth, fifth, sixth, and seventh will be hereinafter set forth. The eighth, ninth, tenth, eleventh, twelfth, and thirteenth will be discussed in the opinion without being set out in full, and the fourteenth and fifteenth are merely formal. The following objection to evidence and rejected prayers are those we deem it proper to state in full, numbered 4, 5, 6, and 7:

"4. The court erred in permitting the State to introduce or offer in evidence the coat and trousers of the witness Ivey Sims.

"5. The premeditation and deliberation necessary to constitute murder in the first degree must precede the killing. Acts and conduct of the defendant after the killing are not to be considered as evidence of premeditation and deliberation. If you find from the evidence in this case that the defendant shot and killed the deceased and afterwards moved or caused him to be moved in the car, and loose change fell from his pockets, and later that the defendant searched the pockets of the deceased and took therefrom money, watch, and other articles of personal property, such acts would not be evidence of premeditation and deliberation, and you will not consider them as such.

"6. The court further charges you that the fact that the deceased was put in a well, if you find such to be a fact from the evidence, is not evidence of premeditation and deliberation, and the jury will not consider such act as evidence of premeditation and deliberation.

"7. The court further instructs the jury that if you find from the evidence that the defendant later took the car of the deceased and ran away with it and was later arrested at Newton, and was found with articles of personal property, watch or any other property belonging to the deceased, such facts and circumstances would not be evidence of premeditation and deliberation, and the court instructs you not to consider them as such."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Z. V. Turlington and J. H. Burke for defendant.

WALKER, J., after stating the case: The six exceptions to the charge of the court were taken to that part of it which consisted in the statement by the court of the contentions of the State. We have examined these several instructions with a view of determining if the defendant could have been, in any degree, prejudiced by the manner in which the contentions were stated, and we have found nothing objectionable in them, but, on the contrary, they were exceedingly fair and impartial. The prisoner's contentions were stated in the same way, and nothing was said or omitted that could have prejudiced him in the least. These exceptions from Nos. 8 to 13, both inclusive, came within the well settled rule of the Court that objections to the statement of contentions must be made promptly so that they may be corrected. The latest cases on this subject are *S. v. Hall, ante,* 527; *McMahan v. Spruce Co.,* 180 N. C., 636; *Hall v. Giessell,* 179 N. C., 657. There was not the slightest intimation of opinion by the judge, and the prisoner has not, in law, been harmed by anything he said. This disposes of all the assignments of error except the three which were properly abandoned, the two which were merely formal, and the four which have been reserved.

The fourth assignment is without merit. The issue sharply raised by the contentions of the parties and the evidence was whether the prisoner or the witness, Ivey Sims, shot Nance, and in order to show that it was impossible that Sims could have done so, his coat and trousers were exhibited to the jury, which furnished evidence of the fact. We do not see why this was not competent and relevant as a circumstance to be considered and weighed by the jury in passing upon the disputed question as to which of the two men fired the fatal shots. As the prisoner has attempted by his own testimony to show that Sims carried a pistol in his hip pocket with which he did the shooting, it was clearly competent, by exhibiting his clothes, to show that this was impossible and therefore untrue. Similar evidence was admitted below in *S. v. Vann,* 162 N. C., 534, 539, and approved by this Court. It is said in Underhill on Criminal Evidence, sec. 47: "An article of personal property, the relevancy of which has been shown by its identification with the subject-matter of the crime, may be exhibited to the jury in the court room, either as direct evidence of a relevant fact or to enable them to understand the evidence, or to realize more completely its cogency and force." The prisoner objected to this evidence upon the ground that it was immaterial, and the ordinary rule in an appellate court confines him to the specified ground, but owing to the importance of the case we have discussed its competency generally. In his brief he insists that the evidence, "because of the great weight attached to an ocular demonstration," was prejudicial to him. This view is fully answered in *S. v. Vann, supra.* It is not a valid ground of objection to evidence that it tends to prove the fact in question more conclusively when the article to which it refers is exhibited, instead of being left to a mere description of witnesses. Such an objection fails to take into account the distinction between the strength of evidence and its competency or relevancy.

We come now to the three exceptions raising the question whether what occurred immediately after the homicide is evidence of premeditation and deliberation on the part of the prisoner.

There are authorities for the position that any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case. *S. v. Robertson*, 166 N. C., 356; *People v. Beckwith*, 108 N. Y., 67-75; *Commonwealth v. Umilian*, 177 Mass., 582; *Commonwealth v. Best*, 180 Mass., 492; *S. v. Dickson*, 78 Mo., 438; *Duncan v. Commonwealth*, 12 S. W., 673; 21 Cyc., pp. 897, 898. It was said in *People v. Beckwith, supra:* "Then followed immediate but well-considered mutilation of the body into convenient parts for burning and its attempted destruction, but especially, and first, such parts of it as contained peculiar marks, as the head, the hand, the foot. On the same day, falsehood by Beckwith as to the thing burning in the stove and the going away of Vandercook, his own flight, taking with him all articles of value or of use from the pockets of the dead man. These are among the circumstances which might well lead the jury to the conclusion that there was, on the part of the defendant, malice and an intention to kill, and that the killing by him of Vandercook was in pursuance of premeditation and deliberation, rather than the effect of sudden anger and without design." But we need not rest our decision on this ground or approve all that is said in some of the authorities we have cited, because we think there is evidence in the record that what occurred immediately after Nance was killed formed a part of a plan conceived by the defendant before the homicide was committed, he having deliberately and premeditatively determined beforehand not only to slay Nance, but also decided how he would conceal the dead body so as to escape the penalty of the law for his crime. This was one thing that induced him to kill Nance as he considered it safe to do so, not being willing to take any chances with the law. He had planned for the disposal of the body by its concealment in the unused well, and his conduct as he and Sims left the place where the murder was committed, and what he said to Sims about where he was going and what he intended to do with the body, all went to show that he had thought out the entire scheme in the beginning and had weighed it before arriving at the definite conclusion to kill. The means of concealment and the secret disposal of the body, which he had devised and which he evidently believed would be successful, had emboldened him to commit the fatal act. His acts throughout were continuous, proving to be one connected whole. As soon as he had killed the deceased he instantly began to dispose of the body in such manner, with such precision of method and with such dispatch and expedition as to indicate that it was something he had was absolutely no necessity for doing so, as appears unless for the purconceived plan of murder. There was no time for reflection needed and consequently no hesitation about what he would do, because all of the thinking and deliberation had been done before. A somewhat similar question arose in *Litton's case,* 101 Va., 833, where the Court said, at page 843: "The homicide had been clearly proven, and there was direct evidence on the part of the Commonwealth to show intent, deliberation, preparation, and malice on the part of the prisoner by proof that he had in his possession shells fitting the gun he used, and which had been loaded previously to the homicide with similar shot to those which entered the body of the deceased. . . . It was clearly admissible, as we have said, to show deliberation, preparation, and malice; and the court having, in clear and unmistakable terms, instructed the jury to disregard it if they had reasonable doubt that the prisoner was connected with the two shells produced, there was no ground left upon which he could complain of its introduction." See, also, *S. v. Brown,* 168 Mo., 449; *Luton v. S.,* 64 S. W., 1051. This case is stronger than either of those in its facts, and it differs in the respects enumerated from *S. v. Foster,* 130 N. C., 666, where flight alone was held not to be evidence of premeditation and deliberation, so as to raise the crime of murder to the first degree, the idea being that if Foster had committed only murder of the second degree or manslaughter, he might just as well have resorted to flight as a ready escape from punishment. But there are other facts and circumstances here which point to a time before the murder, and are of a more significant character. 3 Rice on Evidence, p. 221.

In *Stanley v. S.,* 64 S. W., 1051, it is said: "Exception No. 2 of the defendant complained that the court erred in permitting the introduction of certain testimony going to show that, shortly subsequent to the homicide, witness met appellant and that appellant had a target gun concealed on his person. The court states in the charge that said testimony was admitted as going to prove appellant's animus and the condition of his mind, relating back to the intent with which he struck deceased and caused his death. It is well settled that declarations of appellant which tend to develop the *res gestæ* or show the intent or motive with which the crime was committed, both before and after the crime, are admissible testimony."

The substantial question in our case is whether the prisoner or Sims fired the fatal shot, and the jury have settled that against him. There can scarcely be any doubt on the question of "premeditation and deliberation" or that it was done in cold blood. Why did the prisoner leave the motor car, go to his house in the dark and get his pistol? There was absolutely no necessity for doing so, as appears, unless for the purpose of using it as he did. He had ample time for reflection and the formation of a definite purpose to kill, and he was not long in executing his purpose, and so immediately did he do so as to leave no room for any but one conclusion, which is, that he intended to shoot Nance with it.

The other facts recited in the prayers for instructions, as to premeditation and deliberation, were competent, as they tended to show that he killed in the perpetration or attempt to perpetrate a robbery, which is especially mentioned in the statute as an act constituting murder in the first degree. They were pertinent circumstances to be considered by the jury in determining the degree of crime, and whether the prisoner had committed the highest felony in the law of homicide as defined by the statute or one of lower degree. C. S., 4200.

The prisoner was well acquainted with the neighborhood where the crime was committed and where he lived. He knew where to find the abandoned well, in which he intended to cast the dead body of his victim, and he carried out his preconceived plan with great secrecy, even telling Sims "to shut up" when the latter inquired what he proposed to do with the body. When he had finished the gruesome task he had undertaken he stole Nance's car and fled to another county, believing that he would succeed in escaping detection, but the confession or betrayal of Sims frustrated his plans and defeated his purpose.

The court instructed the jury correctly as to whether any particular time must elapse before the homicide and after the deliberate and premeditated intent to kill has been formed. The cases on this subject are collected in the notes to section 4200 of the Consolidated Statutes, at p. 1732.

There was evidence which tended to show that the prisoner had done what he had previously intended to do, for he so expressly stated after the crime had been committed.

We have endeavored to consider and to carefully examine every material phase of this case presented in the record and in the able and impressive argument of the prisoner's counsel delivered before us, but after all this has been done, and with an earnest desire to reach the very truth of the matter, under the evidence and the law, and with careful and strict regard for the prisoner's rights, we can but conclude that there was no error in the trial of the cause.

No error.

STATE v. WALTER BEAM.

(Filed 25 May, 1921.)

1. **Criminal Law—Husband and Wife—Abandonment—Statutes—Limitation of Actions.**

Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh "abandonment and failure to support," made a misdemeanor by C. S., 4447, and an indictment found within two years therefrom is not barred by the statute of limitations.

2. **Criminal Law—Husband and Wife—Abandonment—Actions—Venue—Courts—Jurisdiction.**

Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is indictable under the laws of this State in the county of her residence. C. S., 4447.

3. **Criminal Law—Husband and Wife—Abandonment—Justification.**

A conviction of a willful abandonment by the husband of his wife is equivalent to a finding that he has left her without justification. C. S., 4447.

4. **Criminal Law—Husband and Wife—Abandonment—Support—Indictment—Evidence—Burden of Proof.**

Upon a trial under an indictment of the husband for the abandonment of his wife (C. S., 4447), both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense.

APPEAL by the defendant from *Long, J.,* at July Term, 1920, of BUNCOMBE.

This is an indictment of the defendant for the willful abandonment of his wife without providing adequate support for her. C. S., 4447.

They were married on 25 January, 1912, and he abandoned her on 5 April, 1916, but they lived together a short time in the fall of 1916, when he again abandoned her and went to Georgia to live, the wife remaining in Asheville, N. C. The defendant provided his wife with money by remittances from time to time for her support. These contributions were made to a time within the two years next preceding the finding of this indictment. There was a verdict of guilty, and from the judgment defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Mark W. Brown for defendant.

WALKER, J. There are only two material questions in the case:

1. Is the prosecution barred by the statute of limitations? This was presented in several ways by the defendant, who set up the bar. The facts bearing upon this contention are that defendant willfully abandoned his wife at Asheville, where they lived, in April, 1916, and went to the State of Georgia, making his home there. He promised to send her money from time to time for her support, and did so until they became reconciled in the fall of that year for a short while, a few days, and during that time lived and cohabited together as man and wife, when he again abandoned her and returned to Georgia, but continued to make regular remittances of money to her at Asheville for her support and maintenance until a time within two years before this indictment was found by the grand jury, when he ceased to do so. This failure on his part to continue in the performance of his duty to support her was, in law, a fresh act of "abandonment and failure to support" within the meaning of the statute (C. S., 4447), and it has been so expressly held upon a state of facts identical with those we find in this record. *S. v. Davis,* 79 N. C., 603; *S. v. Hannon,* 168 N. C., 215.

2. The other position also is untenable. The fact that defendant lived in Georgia, from which State the remittances were made, has not the effect of making it a Georgia transaction, so as to bar this prosecution under our statute or to oust the jurisdiction of our courts. He promised to send the money to her at Asheville, and did so for some time until he changed his mind and broke his promise. The money was due and to be paid at Asheville in this State, and should have been paid there, and his failure to do so and to provide for her support at her home, which was in Asheville, constituted the statutory offense. This very question was decided in *People v. Meyer,* 33 N. Y. Supp., p. 1123, it being a criminal proceeding for a like offense as here, that is, abandonment without providing for the wife's support. *Judge Goff* said: "This

was separation, not abandonment; and so long as the appellant continued to pay the stipulated sum he did not abandon his wife. Whether the separation took place in the city of Brooklyn or in the city of New York is immaterial. The material question is, Where did the abandonment take place if the appellant did abandon his wife? The evidence shows that after the separation the wife left Brooklyn and took up her residence in New York, and that at the time when the complaint was made she was actually residing in the latter city. The appellant was bound to pay the stipulated sum to his wife no matter where she resided. He, having agreed to the voluntary separation, was precluded from controlling her choice as to a place of residence. His domicile was no longer her domicile, and therefore she had a right to take up her residence in New York. It is conceded that he failed to pay the stipulated $15 per week, that by his own action he reduced the payment to $12 per week, and finally offered her $3 a week, which the trustee refused. The criminal law cannot enforce the observance of contracts; neither will the authorities institute or prosecute proceedings of a criminal nature for such a purpose. Did the appellant abandon his wife and child in the city of New York without providing for and furnishing them with adequate means of support, so that there would be danger of their becoming a burden on the public? That was the question for the magistrate to decide, and he decided it affirmatively and, in my opinion, correctly." With more reason can it be said that where the husband willfully abandons his wife he cannot direct her choice of residence. It would be allowing him to take advantage of his own wrong, if we should so decide. The crime, therefore, was committed in Buncombe County, where she lived. The jury convicted him of willful abandonment of and failure to support his wife, which means that his acts were without justification.

There are two elements of this offense—willful abandonment and failure to support—and both must be alleged and proved. *S. v. Toney,* 162 N. C., 635; *S. v. May,* 132 N. C., 1021; *S. v. Smith,* 164 N. C., 476; *S. v. Hopkins,* 130 N. C., 647. Abandonment is not a continuing offense, day by day (*S. v. Hannon,* 168 N. C., 215), but the duty to support the wife is a continuing one during the existence of the marital union, and must be performed unless there is some legal excuse for nonperformance of it, and when defendant withdrew his support from his wife he became indictable under the statute, even though he lived in another State and had kept his promise and supported his wife for several years. His last delinquency must fix the beginning of his criminal liability.

No error.

STATE v. J. T. HARRIS.

(Filed 3 June, 1921.)

1. **Courts—Discretion—Evidence—Conduct of Trial.**

   The trial judge has discretionary power to control the order of the admission of the testimony, which is not reviewable when no substantial right of the appellant is thereby impaired.

2. **Same—Introduction of Witnesses—Cross-examination—Waiver—Homicide.**

   It is not an abuse of the discretion of the trial judge in directing the admission of testimony relating to the mental capacity of the prisoner to permit medical expert witness for the State, at his own request, and for good reason shown, to give his evidence during the taking of the prisoner's evidence, when plenary evidence has been introduced upon which to base the hypothetical questions, nor will it be held for error that the time allowed for the taking of this evidence was insufficient for the prisoner's cross-examination, when it appears from the case on appeal, settled by the judge, that this witness left the stand with the consent of the prisoner's counsel.

3. **Homicide—Cross-examination—Waiver.**

   The prisoner's counsel may waive his right to cross-examine a State's witness on the trial for a capital offense.

4. **Homicide—Husband and Wife—Evidence—Statutes—Prejudice.**

   The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by C. S., 1634, though she is competent to testify.

5. **Homicide—Appeal and Error—Harmless Error—Evidence—Husband and Wife—Courts—Exclusion of Evidence.**

   Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of the statute, C. S., 1634, by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed.

6. **Appeal and Error—Objections and Exceptions—Instructions—Homicide.**

   Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, C. S., 1634, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject.

7. **Courts—Terms—Statutes—Continuance from Day to Day—Entries—Records—Homicide.**

   Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, is a sufficient compliance with C. S., 4637, providing, among other things, "that in case the term of a court shall expire while a trial of a felony shall be in progress and before judgment shall be given therein, the court shall continue the term as long as in his opinion it shall be necessary for the purposes of the case."

8. **Appeal and Error—Record—Unnecessary Matter—Costs.**

Under the facts of this appeal from a conviction of murder in the first degree, the Supreme Court refused the motion of the prisoner's attorney to tax the State with the cost of printing alleged unnecessary matter.

9. **Appeal and Error—Settlement of Case—Presumptions—Courts—Discretion.**

The trial judge, in settling the case on appeal, is conclusively presumed to have acted in the conscientious discharge of his duty, and the appellant may not successfully insist, in the Supreme Court, that upon the trial the counsel for appellee abused their privilege in their argument to the jury to his prejudice, when there is no such exception or assignment of error in the record sent up; and the Supreme Court has no power to compel the trial judge to amend the case settled by him.

10. **Appeal and Error—Settlement of Case—Stenographer's Notes—Courts.**

While the notes taken at the trial by the official stenographer are considered as of great weight in aiding the trial judge in settling the case on appeal, they do not control or displace his authority therein, and his statement thereof will control.

11. **Appeal and Error—Objections and Exceptions—Assignments of Error.**

Exceptions will not be considered in the Supreme Court on appeal that are not set out in the record as having been taken at the time (except to the charge), and must be duly assigned as error.

STACY, J., dissenting; HOKE, J., concurring in the dissenting opinion.

APPEAL by defendant from *Long, J.,* at November Term, 1920, of BUNCOMBE.

The prisoner was convicted of the murder in the first degree of F. W. Monnish. The evidence for the State was that on 3 September, 1920, about 10 a. m., the prisoner, J. T. Harris, a merchant of Ridgecrest, Buncombe County, lay in wait in weeds near a path coming from the cottage of F. W. Monnish to the postoffice at that station and with a shotgun fired two charges into Monnish as he passed by. Soon after, about 10:45, a train going to Asheville arrived, Monnish was placed upon this train and died before arriving at Asheville. The killing was admitted, and there is nothing in the defendant's evidence which contradicts the circumstances of the killing. The State's evidence was that the plaintiff left his store a few minutes before the fatal occurrence, carrying a shotgun, and that tracks led from the rear of the plaintiff's store into a small patch of corn or weeds growing along the roadside; that the ground was trampled at two places at the edge of said corn patch between the plaintiff's store and the place from which the fatal shots were fired. The State contended that the plaintiff had lain in wait for the deceased and that the killing was willful, deliberate, and premeditated. The State also contended that from the evidence the cause of the killing was that the deceased was aware that the prisoner was furnishing sugar and meal to persons who were engaged in illicit distilling and had made some remarks or given information in regard thereto. The prisoner did not deny that he shot and killed the deceased with a shotgun, but relied solely for his defense upon the plea that at the time of the killing he was insane and not legally responsible for his act. The defense set up was that defendant was insane at the time of the killing, and the special delusion under whose influence he alleged he was acting at the time was that Mounish had seduced his wife. The evidence is set out in the record in full, and it was all directed to the circumstance of the killing and the defense of insanity. From sentence of death, the prisoner appealed.

Attorney-General Manning, Assistant Attorney-General Nash, M. W. Brown and J. E. Swain for the State.

Jones, Williams & Jones and Frank Carter for prisoner.

CLARK, C. J. There are only three assignments of error, except the formal ones to the refusal to set aside the verdict and to the judgment, and it is unnecessary to make a fuller statement of the record. The slaying was admitted, and the defense rests upon the plea of insanity.

A number of experts testified for the State that in their opinion, upon the facts recited in the hypothetical questions propounded by the State, that the prisoner was not insane at the time of the killing. There was also evidence by a large number of witnesses, who were more or less in frequent association with the plaintiff in business and in social life, that in their opinion the plaintiff was sane. On the other hand there were a number of experts who testified that in their opinion the prisoner was insane at the time of the killing in such way that he did not comprehend the moral and legal quality of the act that he was doing. There were also witnesses who testified as to the mental condition of the prisoner and also as to the mental condition of his father and mother. This issue of insanity was fully presented and ably and elaborately argued by counsel for both sides, and a full and able charge by his Honor presented the controversy to the jury who, after deliberation, found the prisoner guilty. The three assignments of error are as follows:

First assignment of error. Dr. V. D. Hilliard was examined as an expert for the State, after it had previously examined twelve of its witnesses and the prisoner had examined fifteen of his witnesses and partially examined another. While the prisoner was examining this last witness, H. C. Caldwell and J. E. Stoffell, witnesses for the State, both residents of Tennessee, were by consent permitted to testify. When the prisoner's counsel had concluded the cross-examination of the latter the State called Dr. Hilliard to the stand whose very full examination is set out in the record.

When the prisoner's counsel had finished the cross-examination of Stoffell the State put Dr. Hilliard upon the stand, stating the reasons for doing so at that time, and asked him to state to the court what conditions had arisen that made it necessary for him to leave the State. He replied: "I have been having telegrams for the last two or three days from my wife, who is in New Hampshire, where her mother is very ill, dying, and she has wired me to come. Once she told me not to come and then that her mother is lying in almost a dying condition, and I have promised day after day that I would go. I ought to have left three days ago. The last telegram I had last night was, 'For heaven's sake leave on the 6 o'clock train this morning.' It is a long journey way up to New Hampshire. I have had half a dozen telegrams." The court, after further questions to witness, made the following order: "It appearing to the court that the facts set forth by Dr. Hilliard above are true, the court now allows him to be examined, but at the same time announces to the counsel for the prisoner that as, under the law, the prisoner can take depositions of witnesses to be heard in this case, they can take such steps as they may deem proper to have the deposition of the witness taken later if they may have questions as to any other questions that they may desire to ask him as a witness in this case, provided it is done in time to be read to the jury during this trial; and the court will require the law officers of the State to waive notice that such depositions may be taken." The counsel for the State then propounded to Dr. Hilliard the hypothetical question set out in the record, to which witness answered that in his opinion the defendant was sane. The prisoner then propounded his hypothetical question, to which the witness replied that in his opinion at the time of the killing the prisoner knew right from wrong. The cross-examination was continued as set out in the record when, finally, the witness said, "If it please your Honor, my train is about due." Questioned by defendant's counsel, "You have got to go now?" the witness replied, "Well, it is about twenty minutes of my train time and I have to get my grip." The counsel for the prisoner said, "I won't keep you. There are more questions I want to ask you but I won't keep you." Dr. Hilliard said, "I really would be very much disappointed if I did not get the train, and I know it would be a bitter disappointment to my wife." The counsel for the prisoner then said, "Well, stand aside.

I am not through with you, but—." The witness thereupon left the stand at 4:20. The presiding judge finds the facts of the occurrence as follows:

"The court states in this connection what can be seen from the record, made when this witness was put on the stand, that the court used its discretion in allowing the State to put this witness on the stand whilst the prisoner was offering his evidence, and for a brief period of time displaced the prisoner's witness, Dr. Bisch. The court also states the fact that after the witness was thus allowed to be put on the stand by the State, and whilst he was under cross-examination by the prisoner's counsel, that the court did not stand him aside for the 4:50 train or any other train; but on the contrary did require him to remain on the stand until he, upon his appeal made to get on the 4:50 train, was allowed to be stood aside by the prisoner's counsel. The court did exercise its discretion in allowing him to be examined, as stated above, at the time and under the circumstances as it appears in the record. And if this was an abuse of discretion, the Court above should correct the error. If it had been necessary to detain the doctor on the stand until the next day, the court would have done it and until the prisoner's counsel had examined him and closed their examination.

"It is but fair to state also what the court meant by informing the prisoner's counsel that it would provide for the further examination of the witness after the prisoner had put on other witnesses to which his counsel refers in order to more satisfactorily examine Dr. Hilliard. The case required two weeks for its trial. There was an abundance of time by waiver of notice on the part of the State's counsel to have had Dr. Hilliard's deposition taken at Littleton, New Hampshire, or in any other State in the United States, and before the evidence in the case was closed. And this the court would have provided for if it had been asked by the prisoner's counsel, and this explains what the court meant by what it said at the time, that the deposition of the witness could have been taken under the statute and the court would require the counsel for the State to waive notice. And the counsel for the State, besides, then and there agreed that they would waive notice."

The judge is not a mere moderator but is the presiding officer and an essential part in any trial as this Court has often held, and he has authority to so direct the admission of testimony as in his discretion he thinks proper, provided no substantial right of the prisoner is impaired by any arbitrary action on his part. *S. v. Southerland*, 178 N. C., 676; *S. v. Baldwin*, *ib.*, 687. In permitting examination of this witness under the circumstances set out in the record the court in our judgment did not abuse this discretionary power. The witness' permission to go was assented to by the plaintiff's counsel and not by the court. Indeed, if examination had proceeded without the long preliminary examination in the record he might well have concluded in time to take the train. The right to confront witnesses necessarily includes the right to cross-examine them, but this is a right which the prisoner's counsel could waive. *Turner v. Livestock,* 179 N. C., 457. The prisoner's counsel, according to the record, did waive it by assenting to the witness leaving under the circumstances. He had propounded his hypothetical question and had examined the witness, and there is nothing in this record indicating that he was debarred from asking any question which he desired. The counsel stated that he wanted to ask him other questions but that he would excuse the witness. He repeated this twice. He did not state what the purport of the additional questions was, and we cannot presume that the failure to ask them was injurious. If the omission would have been injurious it is very certain that the able and conscientious counsel for the prisoner would not under any circumstances have consented, as they did, for the witness to leave without these questions having been asked. There is nothing tending to show that such omission was injurious to the prisoner. The witness, who was one of several experts, had been, in ordinary phrase, "pumped dry" by the hypothetical questions asked by the State and by the prisoner.

Second assignment of error. For some reason, which does not appear upon the face of the record, neither the wife nor the daughter of the prisoner were examined as a witness in his behalf. His son, Paul Harris, was a witness for the prisoner, and in the course of his examination said that he had mentioned his "father's mental condition to his mother many times after his outbreaks or something. . . . I told my mother that father was an insane man and that no sane man would have such thoughts." Upon cross-examination counsel for the State asked, "The question just propounded to you about the declaration to your mother, have you had your mother subpœnaed as a witness?" Answer: "No, sir." The prisoner objected. The counsel for the State then said, "I want to ask if you have not had your mother subpœnaed as a witness and discharged her." The court then states: "When the questions above were asked the counsel for the prisoner interposed an objection, and the conversation ensued, followed by statements of counsel, before the court had time to give or render decision. The court then ruled out all the questions above, and in connection therewith read the following statute in the presence of the jury." Rev., 1634, p. 1917. "The wife of the defendant in all criminal actions or proceedings shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. But every such person examined as a witness shall be subject to cross-examination as are other witnesses."

The witness then proceeded to testify that his sister had been subpœnaed and that the counsel for the prisoner had conferred with her;

that he and his mother were present; that his sister was not here at the trial; that she is twenty years old; that he did not know the reason why she did not come to court, there was no sickness in the family; that he did not expect her to be here because she had been released from the subpœna; that he did not know who had it done but supposed it was done by his father or his father's attorneys; that he spoke to his father about his sister not being a witness and that he seemed grieved that she could not come. The witness was then asked, "Do you know of any other witness that has been released besides your sister?" Upon objection to this question "the court, ruling upon the objection, stated that if the witness himself knew that witnesses have been released by the prisoner himself, or by his authority, or through his counsel or himself, he may answer; otherwise, if he has information from other persons than the prisoner himself, or his counsel now present, in the presence of the witness himself, he shall not answer. Of course this ruling of the court has no relation to the ruling heretofore made by the court in regard to the plaintiff's wife."

The witness was then asked, "Has anybody else been released besides your sister and your mother?" The prisoner objected because this implied that the mother had been subpœnaed and released. The court sustained the objection and repeated its ruling on that matter as previously made. The counsel for the prisoner then asked the court to charge the jury at that stage that this line of questions by the counsel for State was improper and ought not to be considered, to which the court said, "I have made a ruling. You may have an exception if you want it. Now he must go on to something else." The counsel for the State then said, "What I am trying to ask you, have you released any other witnesses other than those whose names have been mentioned here this morning." The court "ruled out this question as this has reference to the prisoner's wife." This was the second exception. The judge states in regard to this matter:

"The prisoner assigns as error the ruling of his Honor in refusing the request of counsel for the prisoner to charge the jury that the repeated questioning of the witness, Paul Harris, as to the discharge or release of the wife of the prisoner as a witness on behalf of the prisoner, was improper and ought not to be considered by the jury, and for that instead of so charging the jury, either at the time said request was preferred or in his general charge, his Honor permitted counsel for the State and for the private prosecution, in their arguments to the jury, to direct the attention of the jury sharply to the fact that the wife of the prisoner had not been called as a witness, and for that instead of charging the jury as requested by the prisoner, the court permitted the acting solicitor, in the course of the closing argument to the jury, to declare that 'this prisoner has already been tried by his wife and daughter and they have found him guilty and condemned him to death.' The court allows the prisoner's counsel to put this exception as all others in their own words, but the court states as a fact that the prisoner's counsel never prayed instruction for the charge above referred to, nor did they object or except to anything said in the argument of either of the counsel in their speeches made to the jury at any time during their arguments, either orally or in writing; and it will further appear that as to the rulings made by the court, with regard to what happened when Paul Harris was on the stand and the release or discharge of the prisoner's wife as a witness, the court sustained the objection of the prisoner as will appear in the record as above set out."

We do not find that the court was lacking in diligence or promptness in excluding all references to the plaintiff's wife. There is no exception to charge of the court nor for refusal of any prayer for instruction.

The third assignment of error is to the alleged failure of the court to make a formal order continuing the trial of the cause after the expiration of the term by limitation. The statute, C. S., 4637, reads as follows: "In case the term of a court shall expire while a trial for felony shall be in progress and before a judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case, and he may in his discretion exercise the same power in the trial in any cause in the same circumstances except civil actions begun after Thursday of the last week." The statement of the judge as to this matter and the entries on the docket show that the term was continued as provided in the statute. In regard to this exception the prisoner's counsel in their brief say they "deem it their duty to submit this question to the judgment of the court, but concede that a failure to properly continue the term would have no other legal effect than to work a mistrial, unavoidably in law, which would cut the prisoner off from the plea of former jeopardy," and add, "Upon the merits of the question, we venture to doubt whether a mere adjournment from day to day can constitute such continuance of the term as the statute contemplates." We think the statute was complied with by the daily entries on the docket: "Pending the trial of the case of *S. v. J. T. Harris,* the court takes a recess until 9:30 tomorrow," and the entry next day, "Court convened at 9:30 a. m. pursuant to recess," etc., in regular form.

The above are the three exceptions which are the only ones set out in the assignments of error besides the two formal ones, as already stated.

The prisoner's counsel in this Court moved to tax the appellee with the cost of making the transcript and pleadings made in the record from pages 32 to 289, setting forth: "In support of this motion, the prisoner respectfully directs the attention of the Court to the fact that the prisoner has only three exceptions and assignments of error, no one of which requires or suggests an examination of the whole evidence or the whole of the charge of the court; by reason whereof the prisoner respectfully insists that the narration of all the evidence in the case and the charge of the court set out in said 'Exhibit A' (being record, pp. 32 to 289, inclusive) are not pertinent to any exceptions in the case; that they injuriously encumber the record, and that the prisoner has been required to pay the cost of setting up and printing 257 pages of this unnecessary and irrelative matter, from the cost of which he prays a relief in conformity with Rule 31 of this Court."

The Court discourages sending up unnecessary matter in the record, but this being a capital case, we cannot say that sending up the whole of the evidence and the charge of the court were improvidently ordered, especially in view of the motion by the prisoner for a *certiorari* for additional findings of fact by the judge. The motion to tax the costs of that part of the record against the State is denied.

The prisoner, however, insisted in the argument here that there had been an abuse of privilege by counsel for the State in the argument of this case. There was no such exception or assignment of error in the record as sent up.

This Court has always held that we have no power to compel the trial judge to amend the "statement of the case," for he is acting under the same authority and obligation of his oath as this Court, and is conclusively presumed to have acted in conscientious discharge of the obligation thereby imposed on him. "The statement of the case on appeal imports absolute verity, and a *certiorari* will not issue to force the judge to make up a new case and insert matters alleged to have been omitted." *Cameron v. Power Co.,* 137 N. C., 101; *S. v. Journigan,* 120 N. C., 568; *S. v. Hart,* 116 N. C., 977; *Paper Co. v. Chronicle,* 115 N. C., 147; *Allen v. McLendon,* 113 N. C., 319; *S. v. Debnam,* 98 N. C., 712; *S. v. Gooch,* 94 N. C., 982; *S. v. Miller, ib.,* 902; *S. v. Gay, ib.,* 821; *McCoy v. Lassiter, ib.,* 131. In the latter case the counsel filed affidavit in support of his motion alleging misapprehension of the facts by the judge, the Court held: "This proposition seems to us very singular and without precedent. We cannot for a moment think of allowing it to prevail. To do so would be subversive of the integrity and dignity of judicial proceedings, and justly offensive to the judicial office. The law reposes in the judge implicit confidence as to his ability, integrity, care and circumspection in his official conduct. It confides to and charges him with the conduct of judicial proceedings, as well as the decision of causes and motions cognizable before him. What he says and does in the course of his office must be accepted as true. There arises a strong presumption in favor of the integrity and correctness of his official statement and conduct, and these must prevail unquestioned in the course of procedure until they shall be altered, not summarily as proposed, but, in the absence of statutory regulations, in a way consistent with justice to all parties directly interested, the importance of the matter in question, and the dignity and propriety of judicial action. It is always of serious moment to the public, as well as individual litigants concerned, to bring in question the official conduct of judges." But, upon the motion of the counsel for prisoner, a *certiorari* was sent down to give the judge below an opportunity to set forth more fully the facts as to the alleged abuse of privilege by counsel, to which he sent up the following return:

"The undersigned received the writ issued 17 May, 1921, by your honorable Court asking that the record, with respect to certain alleged arguments and comments of the counsel for the prosecution, be ascertained and incorporated in the record, and to find the facts with respect to the alleged objectionable remarks, if any, made by the counsel for the State during the trial of the said cause, and under what attending circumstances.

"Without repetition, I refer you to what is said in statement of case on appeal, pages 11, 12, 13, 14, 15, 16 and 17.

"It will be noted that I heard counsel on both sides in order to settle the case on appeal, about four months after the trial, and it took many days more in which to finally settle, so that it could go up on appeal.

"The official stenographer of the court in Buncombe, who took down most of the evidence and the proceedings of the trial, was Mrs. Williams, but toward the close of the case one of the counsel for the defense, as I recollect, suggested that Miss Shank come to the assistance of the official stenographer, and she was allowed to do so until the evidence was concluded, but her presence and assistance was no longer required by the court. I had the impression at the time I was making up the statement of the case on appeal that Miss Shank had taken down Mr. Brown's speech and probably Mr. Swain's. I now learn for the first time that she did not take down Mr. Swain's speech but Mr. Brown's speech. This was done without any direction by the court and without its knowledge. The court is now informed today by her statement that she took down Mr. Brown's speech under the direction of one of the defendant's attorneys, Judge Carter. I never had any intimation from any one at the time of the trial that the stenographer was taking down the speeches of anybody or that any one objected to any of the speeches. My attention was called to this some four months later when the court was undertaking to settle the case on appeal. I report as a fact that the taking down of Mr. Brown's (or the speeches of any one else, if they were taken down) was without my knowledge, my attention was not drawn to it, and I report as a fact now again that not one of the attorneys for the prisoner at any time during the argument of the counsel made any objection whatever to the court of anything that was being said by either Mr. Brown or Mr. Swain. If they had done so the court would have caused the official stenographer to have taken down anything they wished and ruled on it and ruled on any objection they might wish to make. But this was not done, and the court had no information as to their having any objection to anything that was said until the matter was called to the court's attention some four months later at Bryson City.

"I got your notice to report the argument of the counsel, etc., on the eve of my departure from Waynesville court to my home to consult a dentist, and as your notice requested instant action I immediately, 18 May, 1921, sent written communications to Messrs. Swain and Brown, representing the State, and Messrs. Jones and Carter, representing the prisoner, and requested them to appear before me in regard to this matter and be heard in Statesville today if they desired to be heard. I also requested Messrs. Brown and Swain that if Miss Shank had taken down the arguments of the lawyers or any of them on either side and could reproduce them and send them to me properly verified I would be glad to have them, and I especially asked Mr. Brown over the phone from Asheville, when I was coming here, to call this to the attention of Miss Shank and the counsel for the defendant. Thus far I have not been able to procure any report of the speeches of Judge Carter or of Judge Jones or of Mr. McKinley Pritchard, all of whom made speeches in behalf of the prisoner. The only thing that I have been able to obtain is an excerpt purporting to be from the speech of Mr. Brown, and is made by Miss Shank under the direction of Judge Carter, and which was never filed in the record and never called to the attention of the court, except as above set out.

"The court of review will see how difficult it is for me, six months after the trial, to report the speeches of five lawyers whose speeches occupied something like two days or two and one-half days time, when I was not asked to have the speeches taken down and when there was no objection made to any of them or anything that was said in any of them at the time they were being made, nor until four months afterward. In the records you sent me I find in the petition of the prisoner what his counsel claim to have been portions of speeches made by Mr. Brown and Mr. Swain. I also note that Mr. Brown has made a sworn statement annexed to the said petition in which he refers to certain evidence, brought out without any objection, of Mr. Paul Harris and Miss Mary Ward, and to which he refers as basis for his argument, but referring as he claims to other persons than the wife of the defendant. I also see attached to the petition an affidavit by Mr. Swain in which he makes a sworn statement as to certain remarks he made and referred to in the petition. I also see attached an affidavit by Messrs. Jones and Carter in which they say 'that comments of the prisoner's counsel upon the failure of his wife to testify in his behalf were coupled with the explanation in substance that such comment was made only upon compulsion and necessity created by the fact that the matter had been persistently thrust upon the attention of the jurors by the counsel for the prosecution, and that, therefore, the counsel for the prisoner could no longer ignore the matter.' I note that the defendant's counsel did not reproduce what they themselves said to the jury in discussing the absence of the defendant's wife, so that the Court above could have an opportunity to know what they were saying in debate about this matter. Whereas they took down what one of the lawyers on the other side said and wished me to make it a part of the record of the court, when it was really not a part of the record. As this was a private arrangement between Judge Carter and Miss Shank for what was taken down was not revealed to the court at the time, nor its purpose, I cannot see that it has any place in the record. This would be a novelty in procedure so far as my knowledge and experience extend. I can see no harm that might result from a man having his speech taken down if he wished to do so, or the taking down of a speech of another person, but I cannot understand with what propriety such speech should be put in a record unless the court had been called upon to make some ruling about it. So far as I observed at the time, I saw no abuse by any of the counsel of their privileges and rights in the debate. I was busy preparing my charge during the argument of the counsel practically all the time. I did not make a minute of the argument of any of the attorneys because I was not asked to do so. While Judge Jones was speaking, Mr. Swain called my attention to the fact that Judge Jones was making an explanation or observation with regard to the absence of the defendant's wife. I inferred from this that the defendant's counsel had abandoned their objection, in which I had ruled in their favor, excluding evidence in regard to the defendant's wife, although Judge Jones did not say so in words. I noted during Judge Carter's argument that he seemed to go into this question quite fully and with much earnestness in presenting a comparison of the conduct of the son, Paul, and the conduct of the wife and daughter of the prisoner, who had deserted him, etc., etc. So I again concluded that the counsel for the defendant had abandoned this question. I did note later that Mr. Swain made some allusion to what Judge Carter had said, but what he said was very brief and I do not recall exactly what he did say, but I did understand it was in response to what Judge Carter had to say. As it now seems to me, it was in form of an interrogatory. The solicitor thinks that I interrupted him at this point and suggested that he pass on to something else or the like, but as to this I am not entirely clear. I do state as a fact that I got the impression from the counsel on both sides at the time that this matter was up for open debate and was debated during and after Judge Jones's speech, and by the counsel for the prisoner fully as much or more than by the counsel for the State. I notice Mr. Brown says in his affidavit that he never did make any allusion to the defendant's wife in the opening argument. The Court will see that the evidence in the case contains many references to the wife of the prisoner which were admitted and not objected to. At the hearing today none of the counsel on either side were present. The only thing that the court gets from any of the counsel is a written statement, the affidavit of Miss Shank, which I attach marked 'Exhibit Z,' and a letter from Judge Carter enclosed with the same. I am sorry I cannot furnish you the arguments in full of all the attorneys. If anything further reaches me between now and your final disposition of the case I will send it in with pleasure.

"Awaiting your further orders, I am,

"Respectfully, B. F. LONG, *Trial Judge.*"

The judge attached to this statement sundry affidavits and the statement of stenographers, which are not made a part of the record and are not before us. Though we must take the finding of facts by the judge as conclusive, it is just to him to incorporate the following affidavit of R. M. Mitchell, the sheriff of the county, who was present at the argument:

"That he was sheriff of Buncombe County at the time the above entitled action was tried in the Superior Court of Buncombe County, and acted as officer of the court during the trial of said action; that affiant heard the arguments of the different counsel who appeared for the State and the prisoner; that the first comment made by any attorney as to the failure of the prisoner's wife to appear and testify as a witness was by Judge Thomas A. Jones, who severely criticized the wife and daughter for having deserted the prisoner; that when Judge Jones first mentioned the failure of the wife and daughter to testify in favor of the prisoner, affiant was approached by J. E. Swain, who was acting as solicitor for the State, and said J. E. Swain requested affiant to pay particular attention to the comments then being made by Judge Jones in regard to the wife and daughter of the prisoner; that at the time affiant was approached by said J. E. Swain affiant expressed surprise at the argument then being made by Judge Jones.

"That Judge Frank Carter, who also appeared as counsel for the prisoner, criticized the wife and daughter of the prisoner for having deserted and betrayed him in his time of need, and he paid high tribute to the prisoner's son, who had testified in behalf of the prisoner.

"That the only reference made to the failure of the prisoner's wife to testify was made by Acting Solicitor J. E. Swain in the closing argument, and said J. E. Swain stated that in so doing he was replying to the arguments made by Judge Jones and Judge Carter, and to their criticisms of the wife and daughter of the prisoner because of their failure to testify in behalf of the prisoner."

The judge's findings of fact in this report corresponds with the notes of the official stenographer, though if they had differed the judge should state the facts as he finds them to be. *Cressler v. Asheville,* 138 N. C., 485, in which we said: "The stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge, who is alone authorized and empowered by the Constitution to try the cause, and who alone (if counsel disagree) can settle for this Court what occurred during the trial. . . . Of course if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made and all other matters occurring in the progress of the trial. This would simply depose the judge and place the stenographer in his place for all the purposes of appeal. . . . Now, as always, these matters must be settled by the judge when counsel disagrees. The stenographer's notes will be a valuable aid to refresh his memory. But the stenographer does not displace the judge in any of his functions." This ruling has been cited and approved. *S. v. Shemwell,* 180 N. C., 718, and in other cases.

The uniform authorities are that no exceptions will be considered by this Court on appeal which are not set out in the record as being taken at the time (save only to the charge), *S. v. Ward,* 180 N. C., 693; and further, are duly assigned as error. *Lee v. Baird,* 146 N. C., 361. There was no exception and no assignment of error to the alleged abuse of privilege by counsel. It is a settled ruling of the courts that an objection to the language of counsel as an abuse of privilege must be taken at the time or such exception is waived. *Borden v. Power Co.,* 174 N. C., 73. The presiding judge in this case finds as a fact that no exception to the language of counsel was made and that he never heard of any exception until four months after the trial, and then only upon making up the statement of case on appeal.

After the most careful and considerate attention to each objection urged by the able and zealous counsel for the prisoner we are unable to find that the prisoner was in anywise prejudiced in the conduct of this trial.

No error.

STACY, J., dissenting, HOKE, J., concurring in dissent: The following is the prisoner's first exception as it appears in the statement of case on appeal:

"After the State had rested and the prisoner was offering testimony, and before the prisoner's testimony was closed, and whilst the prisoner was examining one of his witnesses, Dr. Bisch, the State requested the court to allow it to examine three witnesses out of the usual order, stating that the same was done in good faith and from necessity, and thereupon the State offered H. C. Caldwell and J. E. Stoffel, of Bristol, Tennessee, who were examined and cross-examined without objection. The State then called Dr. W. D. Hilliard, a witness for the State, who testified as follows:

"Examination by Mr. Brown:

"Q. Dr. Hilliard, what conditions have arisen whereby it is necessary for you to leave Asheville?

"By Judge Carter (one of defendant's counsel): We wish your Honor to know that we do not think we could do justice to this defendant in the examination of Dr. Hilliard until we have examined one or two other witnesses. We do not think our hypothetical question would have the weight put to the doctor now that it would have after we have examined one or two other witnesses, and we are obliged under the peculiar circumstances under which we would have to examine this witness to object to his testimony at this time.

"By the Court: Wait until we hear something.

"Mr. Brown resuming:

"Q. Dr. Hilliard, state to his Honor what conditions have arisen that make it necessary for you to leave. A. Why, I have been having telegrams for the last two or three days from my wife, who is now in New Hampshire. Her mother is very ill, dying, and she wired me to come. Once she told me not to come, then that her mother is lying in almost a dying condition, and I have been promising day after day that I could go. I ought to have left three days ago. The last telegram I had last night was, 'For heaven's sake leave on the 6 o'clock train this morning.' It is a long journey away up in New Hampshire. I have had half a dozen telegrams.

"By the Court: Is your wife now there? A. There now; yes, sir.

"By the Court: And it is your wife's mother who is so ill? A. Yes.

"By the Court: What point in New Hampshire? A. Littleton, New Hampshire.

"By the Court: Well, don't you see the situation the witness is in? Of course you understand the situation of the case better than I do. Of course I don't understand what the evidence is until it comes out here, but I am put in this position when a witness asks to be allowed to go to the bedside of his wife's mother (interrupted by prisoner's counsel).

"By Judge Carter: I do not believe that appeals to your Honor more than to the counsel, but we feel that until Dr. Bisch and Dr. Knoefel and Dr. Cotton are sworn, especially as to Dr. Bisch, and the result of the personal examination of the prisoner by him, we do not think if we cannot submit their evidence to Dr. Hilliard, particularly the personal examination of the defendant, we do not think we can submit that to Dr. Hilliard at all satisfactorily until Dr. Bisch has been examined, and do justice to the case. It is exceedingly painful to us to take this attitude and we would not do it if we could avoid it. The State undoubtedly relies upon Dr. Hilliard for testimony of an expert character that they expect to elicit from him, and we feel that not to be able to present the counter hypothesis with any degree of satisfaction to ourselves, we feel that it would be an injustice to our client. We do not feel that we can submit to it.

"By the Court to the counsel for the prisoner: How many expert witnesses have you to be examined?

"By Judge Carter: Two, and they have four besides Dr. Hilliard.

"By the Court: You say you have two?

"By Judge Carter: We have two. We understand they have four.

"By the Court: Now, I will ask them about that. The counsel for the prosecution can state how many they have.

"By Mr. Swain, solicitor appointed by the court in lieu of Solicitor Pritchard, released at his request: We will have three.

"By the Court to the witness on the stand, Dr. Hilliard: What train do you want to take? A. Four-fifty, the only train I can get. My tickets are bought and my reservations are bought.

"By the Court: Tickets and reservations for 4:50? A. In my pocket.

"By the Court: It is now 3:30. A. Yes, sir.

"By Judge Jones (one of prisoner's counsel): I will state to your Honor frankly that I do not think we could possibly get through with him before his train leaves.

"Answer by Dr. Hilliard: I am going to appeal to the court to excuse me and let me off and let me go.

"The court started to remark, 'I don't like to be,' meaning to say that it didn't like to be embarrassed, and further added: 'But there is something the court cannot control, that is the visitation of God. If the woman is dying and her son-in-law says he is a physician, and has waited as long as he has, I will let him be examined.' The court causes to be put upon the record the following: 'It appearing to the court that the facts set forth by Dr. Hilliard above are true, the court now allows him to be examined, but at the same time announces to the counsel of the prisoner that as, under the law, the prisoner can take depositions of witnesses to be heard in this case, they can take such steps as they see proper to have the deposition of this witness taken later as to any other questions they desire to ask him as a witness in this case, provided it is done in time to be read to the jury during this trial, and the court will require the law officers of the State to waive notice that such deposition may be taken.'

"Judge Jones: If it pleases your Honor, if Dr. Hilliard leaves on the 4:50 train to go to New Hampshire he will be out of the State and we could not quit the case to go up there, and if the mother of his wife is in such a critical condition, we could not take it if we went there. It is now 3:35. I do not think in justice to our client we could get through with the cross-examination that we wish to put to this witness in time for him to get his train.

"By the Court: So far as the court is concerned his deposition can be taken on the train moving from the depot at 4:50.

"The prisoner's counsel objects and excepts, and except to allowing the witness to testify under these circumstances.

"After this delay in proceeding with the examination the witness was examined by the State and then turned over for cross-examination by the prisoner's counsel. At the close of Dr. Hilliard's testimony the following happened: The witness, Dr. Hilliard, stated to the court: If it please your Honor, my train is about due.

"Question by prisoner's counsel: You have got to go now? A. Well, it is about twenty minutes of my time and I have to get my grip.

"Question by prisoner's counsel: I won't keep you. There are more questions I want to ask you, but I won't keep you. A. I really would be very much disappointed if I didn't get the train, and I know it would be a bitter disappointment to my wife.

"By prisoner's counsel: Well, stand aside. I am not through with you but—

"The witness then left the stand at about 4:20."

(At the time of settling case on appeal his Honor here inserted a statement and explanation which is set out in the opinion of the court.)

The foregoing is a bare statement of the record and no more. It speaks for itself. The prisoner contends that such procedure is not in keeping with the rules of approved practice or the law of the land. He says that a fair examination of the witness, who was offered as a medical expert and for the purpose of answering hypothetical questions, could not possibly be had under the circumstances; that all the evidence bearing upon his plea of insanity at the time of the homicide had not yet been introduced; that counsel were at a great disadvantage in submitting fair hypotheses and important interrogatories; that the jury were in no position to appreciate fully the meaning of questions based upon evidence which they had not then heard; and finally, that he was compelled to examine the witness in an unequal and unsuccessful race against time. It would seem that the prisoner's contentions are abundantly supported by the record.

"A fair and full cross-examination of a witness upon the subject of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court." *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.,* 129 Fed., 668; *Florence v. Calmet,* 43 Colo., 510; *Gilmer v. Higley,* 110 U. S., 47; *Chandler v. Allison,* 10 Mich., 460; *Reeve v. Dennett,* 141 Mass., 207; *S. v. Behrman,* 114 N. C., 804.

The offer to supply the defect by allowing the defendant an opportunity to take the deposition of the witness was wholly inadequate and amounted to a denial of his rights. Even if the cross-examination could have been secured by deposition, the offer within itself was error. Section 1812 of the Consolidated Statutes provides that the defendant, in all criminal actions, may take the depositions of witnesses to be used as evidence in his behalf. But this applies to his own witnesses and not to those who testify against him. It would be strange, indeed, to say that a statute, intended to grant, as it does, a privilege to the defendant, could be used to deprive him of his constitutional guarantees. As to the witnesses offered by the State, he has the right to demand their presence in the courtroom, and to confront them with other witnesses, and to subject them to the test of a cross-examination. *S. v. Mitchell,* 119 N. C., 784. The prisoner may not be required to examine the State's witnesses in the absence of the jury; and the contrary suggestion of his Honor, though unintentional, was prejudicial to the defendant.

"In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." Const., Art. I, sec. 11. "We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put *face to face.*" *Pearson, C. J.,* in *S. v. Thomas,* 64 N. C., 74.

But the defendant's second exception is equally as prejudicial, if not more hurtful than the first.

Paul Harris, son of the prisoner, was introduced as a witness on behalf of the defendant:

"Cross-examination by Mr. Brown: Q. Mr. Harris, the question just propounded to you (by prisoner's counsel) about the declarations to your mother; have you had your mother subpœnaed as a witness? A. No, sir.

"Objection by defendant.

"Q. I want to ask if you have not had your mother subpœnaed as a witness and discharged her?

"By the Court: When the questions above were asked the objection was made thereto, the counsel for the defendant interposed the objection, and a conversation ensued between the counsel, followed by statements of counsel, and before the court had any time to give or render a decision upon the objection. As soon as the court could do so, it ruled out the questions above, and in connection with its ruling the court read to the jury sec. 1634 of the Revisal, p. 917, to wit: 'The wife of the defendant in all criminal actions or proceedings shall be a competent witness for the defendant; but the failure of such witness to be examined shall not be used to the prejudice of the defense. But every such person examined as a witness shall be subject to cross-examination as are other witnesses.'

"Mr. Brown, after examining the said Paul Harris for a period of time, then asked this question:

"Q. Do you know of any other witness who has been released besides your sister?

"Objection by defendant.

"By the Court: The court, ruling upon the objection, states that if the witness himself knows that witnesses have been released by the defendant himself, or by his authority, or through his counsel or himself, he may answer; otherwise, if he has information from other persons than the defendant himself or his counsel now present, and in the presence of the witness himself, he shall not answer. Of course this ruling of the court has no relation of the ruling heretofore made by the court in regard to the prisoner's wife.

"Judge Jones: I don't believe that your Honor had got the question.

"By the Court: Of course this ruling of the court has no relation to the ruling heretofore made by the court in regard to the prisoner's wife.

"By Judge Jones: Please, your Honor, I now ask your Honor, at this stage, to charge the jury that this line of question by the counsel is improper, and ought not to be considered.

"By the Court: I have made a ruling. You may have an exception if you want it. Now he must go to something else.

"Mr. Brown then asked the witness: Q. Has anybody else been released besides your sister and your mother?

"Objection by defendant.

"By the Court: As this implies that the mother has been subpœnaed and released, the objection is sustained. The court has heretofore made a ruling in regard to the defendant's wife, as set out in the record above.

"Question by Mr. Brown: What I am trying to ask you—have you released any other witnesses other than those whose names have been mentioned here this morning?

"Objection by defendant.

"By the Court: Sustained, as this refers to the prisoner's wife."

"The prisoner assigns as error the ruling of his Honor in refusing the request of counsel for the prisoner to charge the jury that the repeated questioning of the witness, Paul Harris, as to the discharge or release of the wife of the prisoner as a witness on behalf of the prisoner, was improper and ought not to be considered by the jury, and for that instead of so charging the jury, either at the time said request was preferred, or in his general charge, his Honor permitted counsel for the State and for the private prosecution, in their arguments to the jury, to direct the attention of the jury sharply to the fact that the wife of the prisoner had not been called as a witness, and for that instead of charging the jury as requested by the prisoner, the court permitted the acting solicitor, in the course of the closing arguments to the jury, to declare that 'this prisoner has already been tried by his wife and daughter and they have found him guilty and condemned him to death.'"

At the time of settling case on appeal, his Honor added the following statement with respect to this assignment of error:

"The court allows the prisoner's counsel to put this exception as all others in their own words, but the court states as a fact that the prisoner's counsel never prayed instruction for the charge above referred to, nor did they object or except to anything said in the argument of either of the counsel in their speeches made to the jury at any time during their arguments, either orally or in writing; and it will further appear that as to the rulings made by the court with regard to what happened when Paul Harris was on the stand and the release or discharge of the prisoner's wife as a witness, the court sustained the objection of the prisoner, as will appear in the record as set out above."

A similar question was presented in the case of *S. v. Cox,* 150 N. C., 846, where the present *Chief Justice,* speaking for a unanimous Court, said: "The State called the wife of the defendant, who was present under subpœna, and tendered her to the defendant. The court ruled that the State could not examine her as a witness—that she was a competent witness only for the defendant. The solicitor, in his argument to the jury, commented on the failure of the defendant to corroborate his own testimony by his wife. On objection made, his Honor stated that 'the wife was not competent and would not be allowed to bear witness against the husband; that her testimony would be competent only in behalf of her husband, and that as the wife was not permitted to testify against her husband, and had not done so, the jury could not consider what she knew or did not know.' And in his charge the court told the jury, 'It was not for the State to examine the wife of the defendant as a witness against her husband, but it was competent for the defendant to use her as a witness.'

"The tender of the wife by the State and the remarks of the solicitor sharply called attention to the failure of the defense to examine the defendant's wife. Objection was made, but the court, instead of telling the jury that they should not let that fact prejudice the defendant, on both occasions rather accentuated the matter by telling the jury that the State could not use the wife of the defendant as a witness, but that he could. The effect, though unintentional on the part of his Honor, was to throw the fault of the wife not being a witness upon the defendant, since he could have put her on and the State could not. There was no caution that such failure to use the wife as a witness should not be considered by the jury. Yet the tender, and the remarks of counsel being called to the judge's attention, called for such caution, and his failing to give it was prejudicial."

And again in *S. v. Spivey,* 151 N. C., 678, speaking of the imperative duty to observe the provisions of this statute, it was stated: "At the close of the testimony of the last witness examined by the State, and before the evidence was closed, the solicitor tendered to the prisoner several witnesses, among them the prisoner's wife, for examination. The prisoner objected to the tender of his wife; thereupon, the solicitor withdrew the tender, stating that he found the name of defendant's wife among the witnesses for the State, and thought it was his duty to tender her to defendant, stating, also, that he would not tender this witness to defendant if defendant did not wish to examine her. The defendant objected. The court then instructed the jury that this incident could not be construed by them, in making up their verdict, as prejudicial to the defendant, or in any way influencing their verdict against him. His Honor, near the close of his charge, again said to the jury: 'At the close of the evidence the solicitor called certain witnesses, whom he tendered to the prisoner for examination. Among these was the wife of the prisoner. The solicitor stated that as he found the name of the prisoner's wife upon the list of witnesses for the State, he deemed it his duty to tender her to the prisoner for examination. The court charges you that the wife of the prisoner is not a competent witness against the prisoner and that her testimony could not be used against him on this trial. The court charges you further, that it is your duty to disregard the circumstances of the tender of the prisoner's wife by the solicitor, and that such tender cannot be used as a circumstance against the prisoner. The circumstance of her having been tendered, therefore, must be entirely disregarded and ignored by the jury in arriving at their verdict.' We have set out in full the matters pertaining to this incident to illustrate how careful his Honor was, not only in the conduct of the trial, but in his charge, to see to it that the prisoner had a fair and impartial trial. There was a similar incident in *S. v. Cox,* 150 N. C., 846, but his

Honor, in the present case, observed the caution pointed out in that case, which the learned judge who tried *Cox's case* had unintentionally failed to observe. While it was improper for the solicitor to tender the prisoner's wife, with the remark made by him, yet his Honor corrected the error fully; and we, therefore, overrule this assignment of error."

Can it be said, in the case at bar, that the failure of the prisoner's wife to testify in his behalf has not been used to his prejudice? The forbidden circumstance was brought to the attention of the jury again and again in many ways and on different occasions. The provisions of the statute surely have been set at naught inadvertently of course, but nevertheless to the prejudice of the defendant. This is not due process of law; and it is fundamental with us and expressly vouchsafed in the bill of rights that no man shall be "deprived of his life, liberty, or property but by the law of the land."

Upon the record, we think the prisoner is entitled to a new trial.

HOKE, J., concurring.

STATE v. B. W. BARKSDALE.

(Filed 7 June, 1921.)

1. **Statutes— Interpretations— Intent— Spirituous Liquors—Intoxicating Liquors.**

The various parts of a statute on the same subject are construed as a whole, to give each and every part effect, if this can be done by any fair and reasonable intendment; and when a literal interpretation of the language will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law will control.

2. **Spirituous Liquors—Intoxicating Liquors—Statutes—Interpretation—Amendments—Exceptions—Flavoring Extracts.**

Our statute, C. S., ch. 66, dealing with the subject of prohibition, provides by art. 2, sec. 3373, an amendment theretofore enacted in 1911, that it is unlawful to sell or dispose of intoxicating liquors for gain, "except as hereinafter provided," followed in sec. 3375, with the proviso, excepting flavoring extracts when sold as such": *Held*, by express terms of the statute, the amendment of 1911, placed in art. 2 of C. S., ch. 66, "flavoring extracts when sold as such" were excluded from the operation of the general law; and any other interpretation would leave the language of the exception altogether without meaning and contravene the manifest purpose of the Legislature.

3. **Same—Defense—Evidence—Burden of Proof.**

Where the State satisfies the jury beyond a reasonable doubt that the defendant has violated C. S., 3369, by selling or offering for sale intoxicating liquors, or those containing alcohol sufficient to make men drunk, the defendant so indicted must be convicted under the provisions of our prohibition law, C. S., ch. 66, unless he has satisfied the jury with his evidence that the liquids he has sold or offered for sale were in fact and truth flavoring extracts and sold or offered for sale as such.

4. **Same—Instructions—Appeal and Error.**

Where the evidence offered by the State is sufficient to convict the defendant under the provisions of C. S., 3369, of selling or offering for sale an intoxicating liquid sufficient to make men drunk, and there is evidence on the defendant's behalf that the liquid was in truth and fact a flavoring extract coming within the exception of C. S., 3373, 3375, and only sold or offered for sale as such, the question of the guilt or innocence of the defendant depends upon the verdict of the jury upon the conflicting evidence, and it is error for the trial judge to direct a verdict of guilty upon the issue, as a matter of law.

5. **Spirituous Liquor—Intoxicating Liquor—Statutes—Unlawful Sales—Flavoring Extracts—Evidence—Permits—Formulas.**

Where there is sufficient evidence on the part of the State to show that the defendant was guilty of offering for sale or selling intoxicating liquor prohibited by C. S., 3369, and also on defendant's behalf that the liquid was a flavoring extract coming within the exception of C. S., 3373, 3375, and only sold or offered for sale as such, it is competent for the defendant to introduce in evidence the permit of the Federal prohibition officer allowing the manufacture of the formula for the extracts the defendant was selling, also the standard as to the use of alcohol in flavoring extracts established by the Agricultural Department, as tending to show his good faith and that the liquid so offered by him was what it purported to be, a flavoring extract, and not sold for a beverage.

6. **Spirituous Liquors—Intoxicating Liquors—Federal Statutes—State Statutes—Conflict of Laws—Courts—Jurisdiction.**

In case of conflict between the Volstead Act, valid under the Eighteenth Amendment to the Constitution of the United States, and a State statute on the subject of prohibition, the Federal statute controls; but where the Federal law goes further than the State statute, and makes indictable an offense not embraced within the provisions of the latter, or where the State statute excepts such act from its general provisions, so that it is not indictable thereunder, the State court has no jurisdiction of the offense, and a conviction may only be had under an indictment in the United States court.

7. **Same—Police Powers.**

Our State police regulations, affirmative in terms, must be established by the State Legislature and not otherwise.

8. **Spirituous Liquors—Intoxicating Liquors—Federal Statutes—State Statutes.**

The Volstead Act, sec. 4, recognizes and provides for the lawful sale of flavoring extracts, when they are unfit for use as a beverage or for intoxicating beverage purposes, and is not in conflict with C. S., 3373, 3375, when such extracts are unfit for drinking purposes.

9. Spirituous Liquors—Intoxicating Liquors—Statutes—Exceptions—"Imitation Extracts"—Evidence.

Where an agent is indicted for violating our State prohibition law, C. S., 3369, and there is evidence tending to show that though he had sold flavoring extracts containing 40 per cent alcohol, they came within the exception of C. S., 3373, 3375, the mere fact that the bottles containing it are labeled "imitation extracts" does not preclude him from establishing his innocence by showing that the word "imitation" had reference alone to the flavor they were endeavoring and intending to produce.

ALLEN, J., concurring; CLARK, C. J., dissenting.

APPEAL by defendant from *Ray, J.*, at the January Term, 1921, of RICHMOND.

The indictment was for "soliciting orders or proposing to take orders, or proposals for the sale of certain spirituous and intoxicating liquors or bitters, or other concoctions containing alcohol." C. S., 3369.

There was evidence on the part of the State tending to show that some time prior to the bill of indictment, defendant, as salesman for Garrett & Company of New York, was offering for sale in and around Hamlet, N. C., certain mixtures or concoctions claimed to be flavoring extracts or essences in bottles of different sizes, from one-third of a pint to a pint, labeled "Garrett & Company, imitation extract, vanilla, grape, banana," etc., twenty-one varieties in all, and that these liquids contained 40 to 45 per cent alcohol, and had in many instances been known to make persons drunk who used them.

Defendant, admitting that the mixture offered by him for sale contained 40 per cent alcohol, or near that, and was about as strong as the average whiskey, offered evidence tending to show that they were in fact and truth flavoring extracts, and were offered by him with the view and purpose of being used and sold as such in the retail trade. That the term on the label, "imitation," did not mean that the article he was proposing to sell was not in fact flavoring extract, but that it was so marked for the purpose of indicating the particular flavor the mixture contained; that is, a flavor imitating brandy peaches, etc. Defendant also offered to show by the chemist having charge of its manufacture that the mixtures offered by him were made after a formula for flavoring extracts submitted to and approved by the Federal Prohibition Commissioner having charge of such matters in North Carolina, and under a permit allowing Garrett & Company to use alcohol in the manufacture of flavoring extracts and that the extracts were made in exact accord with the specifications in said permit, and also in accord with the standard for flavoring extracts established and approved by the United States Department of Agriculture, except that Garrett's extracts lack 10 per cent of containing as much alcohol as the amount adopted for that standard, which evidence, on objection, was excluded by the court and defendant excepted. Defendant's evidence further tended to show that the extracts so manufactured by Garrett & Company and concerning which defendant was indicted were not made for beverage purposes and not fitted for same. That owing to the amount of flavoring essence, the best that could be procured and 150 per cent strong, they had a tendency to nauseate, and could no more be drunk as a beverage than shellac or shoe polish. And that they were made and offered for sale in good faith as being what they proposed to be, "flavoring extracts," and were so offered only for that purpose. It was further proved for defendant that at least 40 per cent alcohol was necessary to the proper making of these flavoring extracts, according to established formulas or any recognized method of manufacture. The entire statement of the expert witness, Dr. B. H. Smith, on the subject being as follows: "15 per cent or 16 per cent will preserve any vegetable product, but it is necessary to use more to get them into solution. Our vanilla extract that is in evidence, that cannot be made properly and preserved with less than 40 per cent. It might be with 2 or 3 per cent less, but approximately 40 per cent, because it is necessary to hold the vanilla in solution—to go to make up the flavor it requires that per cent to hold them in solution."

At the close of the testimony the court, in effect, charged the jury that if the evidence was believed, and the jury found the facts to be as testified to by the witnesses, they should convict the defendant.

Verdict, guilty. Defendant excepted and appealed, assigning for error:

1. The refusal of his Honor to receive the testimony as to the permit and formula of the United States Prohibition Commissioner, and the standard for flavoring extracts adopted by the United States Department of Agriculture.

2. The charge of his Honor that if the testimony was believed there should be a conviction in any aspect of the evidence.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Travis & Travis and Gibbons & LeGrand for defendant.

HOKE, J., after stating the case: The Legislature, at the special session of 1908, passed the general prohibition law against the manufacture and sale of intoxicating liquors, ratified by the voters of the State by a pronounced majority the following May, the principal features of which as pertinent to this inquiry now appear in chapter 66, Consolidated Statutes, designated as article 1. In section 3367 of said article the manufacture and sale of any spirituous, vinous, fermented, or malt liquors is prohibited, except wines, cider, etc., as therein specified. Section 3368, article 1, defines intoxicating liquors as follows: "All liquors or mixtures thereof by whatever name called that will produce intoxication within the meaning of this article, provided that certain specified medical preparations shall not be held or construed to be or come within the meaning of the definition." Section 3369, in transactions coming under the provisions of the article, makes the place of delivery the place of sale, and section 3370 makes it unlawful for any person, for himself or as agent or traveling salesman of any person, firm, or corporation, to solicit orders or proposals of purchase of intoxicating liquors by the jug, bottle, or otherwise, in this State. There being numerous prosecutions under this statute debated on the issue as to whether a given article was intoxicating, the General Assembly in 1911 enacted a further statute, the principal parts of which appear in chapter 66, Consolidated Statutes, as article 2, and in section 3373 of this article it is made unlawful for any person, firm, or corporation to sell or dispose of for gain, "near-beer, beerine, or other spirituous, vinous, or malt liquors, or mixtures of any kind, and under whatsoever named called, that shall contain alcohol, cocaine, morphine, or other opium derivative except as hereinafter provided."

In a subsequent section under this article, 3375, it is provided that the same shall not extend to or include a long list of specified exceptions such as wines, ciders, etc., various medicinal preparations, and including "the sale of flavoring extracts or essences when sold as such." These two articles being parts of the same statute, and dealing with the same subject, are to be considered and interpreted as a whole and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment, and it is further and fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. *S. v. Earnhardt,* 170 N. C., 725-727; *Abernethy v. Comrs.,* 169 N. C., 631; *Fortune v. Comrs.,* 140 N. C., 322; *Keith v. Lockhart,* 171 N. C., 451; Black on Interpretation of Laws (2 ed.), pp. 23-66.

While the exception withdrawing "flavoring extracts when sold as such" is in terms excepted from article 2 of the chapter, it having been proved, and without contradiction, that these preparations cannot be properly made without at least 40 per cent alcohol, and so recognized as intoxicating, a quantity making the mixture "about as strong as the average whiskey," in the language of the witness, it is clear that in excepting these extracts from article 2, it was necessarily the evident intent and purpose of the Legislature to withdraw them from the effect of the prohibition law when they were in fact "what they professed to be and were sold as such." It would not be readily supposed that the Legislature intended to withdraw these preparations of recognized value entirely from domestic use, and when they have expressly excepted flavoring extract from the effect and operation of a law forbidding the sale of "any spirituous liquors, or mixtures of any kind, by whatsoever name known, containing alcohol," it would render this entire exception meaningless, and make the statute a delusion and a snare to entrap the honest dealer, if one acting in good faith under this exception could be indicted, convicted, and imprisoned under the provisions of article 1 of the same chapter. And this position and rule of interpretation, fortified and upheld by a uniform current of decisions here and in other jurisdictions, is not affected because of the suggestion, valid or invalid, and however vehemently urged, that it may afford a means of evading the prohibition law. Such considerations are for the Legislature, whose province it is to enact statutes and to alter and amend them so as to make their purpose more effective. It is ours to construe the laws and not to make them.

This, in our opinion, being the correct construction of the statute, when the State has offered evidence sufficient to satisfy the jury beyond a reasonable doubt that defendant is selling, or offering for sale, a liquor or mixture thereof, containing 40 or 45 per cent alcohol, or which is making men drunk, the defendant should be convicted unless he satisfies the jury, not beyond a reasonable doubt, but satisfies them that what he sells, or is offering for sale, comes within the exception claimed by him, and it must be an extract approved by valid official sanction or recognized as such by the general trade. The burden is on him to so prove to the jury that the article he sells is in fact and in truth what it professed to be, a flavoring extract, and that he is offering it to be used or sold as such for flavoring purposes and not as a beverage. *S. v. Connor,* 142 N. C., 700; *S. v. Goulden,* 134 N. C., 743. And there being testimony, admitted on the part of defendant, tending to show that these preparations were flavoring extracts offered for sale as such in good faith, there was error in holding that on the entire evidence, if believed, and as a conclusion of law, defendant should be convicted, for on such testimony the issue should have been submitted to the jury under the principles as stated. In our opinion there was error, also, in excluding the formula offered, and the permit and approval of the prohibition commissioner thereon, and that the extracts were manufactured in accord with the formula, and likewise as to the standard for vanilla and other extracts, established by the Department of Agriculture. As to the permit, it has been held by our highest Court that the Eighteenth Amendment to the United States Constitution, and the valid provisions of the Volstead Act in furtherance of the same, are, in case of conflict, the controlling law on this subject. Both the one and the other, however, inhibit the manufacture, sale, and transportation of intoxicating liquors only for beverage purposes, and while no State can enact any statute or enforce any regulation in contravention of the declared purpose, there is nothing in either to inhibit a state from passing more stringent regulations in reference to the manufacture and sale of intoxicating liquors, and this permit, therefore, issued by the Federal prohibition officer, is not conclusive or necessarily a protection, *S. v. Fore,* 180 N. C., 744; *Rhode Island v. Palmer,* 253 U. S., 350, but both of these items of evidence are competent as tending to show good faith on the part of the defendant, and that these preparations are in fact what they profess to be, flavoring extracts.

It is urged in support of his Honor's ruling, as we understand the position, that the exception relied upon by defendant is now invalid because in conflict with the Eighteenth Amendment and the Federal statute passed in enforcement of the same, the Volstead Act. As heretofore stated, under *Rhode Island v. Falmer, supra,* and other like decisions, any and all state legislation, in contravention of the Eighteenth Amendment and the valid provisions of the Volstead Act, passed to enforce same are abrogated, and for conduct in violation of the criminal provisions of the Volstead Act, a defendant can be indicted and convicted in the Federal courts notwithstanding that the provisions of the State law would not inculpate. But there is no part of the Volstead Act that provides for or permits an indictment in the State court, and we are well assured that though an exception may be in violation of the Federal law on the subject, a defendant may not be indicted and convicted in the State court for violation of a State statute which contains an exception exculpating him until our own Legislature has acted in the matter and passed a statute that condemns him. Our State police regulations must be established by our own Legislature. We have so held at the present term in *S. v. Helms, ante,* 566.

As a matter of fact, however, there is no necessary conflict between the State and Federal law on the subject, and as presented in the record. The Volstead Act recognizes and provides for the sale of flavoring extracts, enacting in section 4, among other things, that the law shall not apply to flavoring extracts and syrups that are unfit for use as a beverage or for intoxicating beverage purposes, the same in effect and on the evidence as our own exception, "flavoring extracts or essences when sold as such," the testimony on the part of defendant showing that the extracts sold or offered for sale in this instance, when properly made, were "about as fit for drinking purposes as shellac or shoe polish." And in any event our statute, more stringent in this respect than the Volstead Act, contains an absolute prohibition of sale of extracts for beverage purposes having in them any alcohol whatever.

It is further urged for the State, and we understand it was on this that his Honor based his ruling, that defendant failed to bring his case under the exception, as claimed, for that the labels show it was only imitation extracts, but we have already referred to the evidence offered by defendant on this point that these words on the label did not at all mean that the articles offered were imitation extracts but they only had reference to the flavor they had endeavored and were intending to produce.

Having given this case most careful consideration, and reached the conclusion that it has not been tried in accordance with the law as it prevails in this jurisdiction, we must direct that there be a new trial of the issue, undisturbed by the dire and distressful calamities predicted as the result of such a course.

More important, even, than the prohibition law is the constitutional principle which guarantees to every citizen charged with crime an impartial and lawful trial by a jury of his peers.

Venire de novo.

ALLEN, J., concurring: I concur fully in the calm judicial opinion of *Associate Justice Hoke*, which is confined to a consideration of the legal questions raised by the appeal, without reference to newspaper reports and other extraneous matters, which can only excite the passions and confuse the judgment, but since these have been introduced into the discussion it is possibly well to restate the exact question we have to decide.

The defendant is indicted under C. S., 3370, of the prohibition law for "soliciting orders for intoxicating liquors," and his defense is that he was offering for sale flavoring extracts or essences, section 3375, of the same prohibition law providing that the prohibition against sale, manufacture, etc., of intoxicating liquors shall not be construed to forbid "the sale of flavoring extracts or essences when sold as such."

In the brief filed by the State and signed by the Attorney-General and Assistant Attorney-General, after quoting the two sections, 3370 and 3375, it is said, "the terms of the statute permits the sale of these extracts when sold as such."

This being true, the defendant cannot be convicted under our State law if he was selling extracts or essences as such, and not for beverage purposes.

The defendant testified: "I was offering these extracts for flavoring purposes."

He also offered evidence, which was excluded by the court, that the extracts were prepared in accordance with a formula approved by the National Formulary, except that they contained 10 per cent less of alcohol than was permitted by the National Government; also, that this formula was submitted to the National Prohibition Commissioner of New York, and that he issued permits for the manufacture and sale of the extracts.

There was also evidence that the extracts could not be used for beverage purposes, and were "as undrinkable as shellac or shoe polish."

The judge in the court below not only excluded the evidence referred to, but charged the jury that if they believed the evidence of the State to find the defendant guilty, and this Court is of opinion, and so decides, that the defendant was entitled to the benefit of the evidence excluded, and that the whole case ought to have been submitted to the jury upon the question as to whether the extracts were offered for sale as flavoring extracts or for beverage purposes.

The witness Braswell, it is true, stated that a man was arrested because he was drunk from drinking extracts, but he added to his statement, "No; that was not any that Mr. Barksdale sold."

The whole of the answer of Dr. Smith to the question asked him by the court was as follows: "Yes; 15 per cent or 16 per cent will preserve any vegetable product, but it is necessary to use more to get them into solution. Our vanilla extract that is in evidence here, that cannot be made properly and preserved with less than 40 per cent. It might be with 2 or 2½ per cent less, but approximately 40 per cent. We put 40 per cent because it is necessary to hold the vanilla in solution—to go to make up the flavor it requires that per cent to hold them in solution."

If the State law as it stands is defective and imperfect, it is for the Legislature to correct it. We have no such power.

CLARK, C. J., dissenting: The defendant was indicted and convicted for "soliciting orders for intoxicating liquors contrary to section 3370, Consolidated Statutes." The following is the evidence:

J. S. Braswell, chief of police at Hamlet, testified that the defendant, representing Garrett & Company, was in Hamlet soliciting sales for his goods. That he found the defendant at Terry's Grocery Store, a retail grocery, with these samples (pointing to them), and asked him if he was not Garrett's man. The defendant said he was. He then told the defendant that he was violating the prohibition law, and he would have to take him to his office. The witness said, "We discussed the sale of this stuff right freely, and the amount of alcohol it contained, and the defendant told me that this peach and banana extract contained about 40 per cent alcohol; that he delivered it to the merchants in pint packages. I said it would be a good drink and would make a man drunk. He said that was the merchant's lookout, and he had nothing to do with that. I tested it, poured some of the contents of the "peach extract" on the paper, struck a match to it, and it caught fire and burned up. This other stuff, "Virginia Dare extract," contains 40 per cent alcohol. It has a very delicious smell; they drink it freely. Yes; I have seen some drunk on that. They had some of these bottles along and were drunk and in jail on it, and paid fines for drinking it. It is intoxicating. This other bottle is a sample of Garrett's imitation grape extract, labeled "Garrett & Company, imitation grape extract, alcohol, 40 per cent"; this bottle is "Garrett's imitation of apricot brandy"; this is "Garrett's imitation of rum extract"; that other is "Garrett & Company's imitation of apple extract." This is "peach extract." That tastes good—is a right good drink. That next is "Garrett's imitation of banana extract." I have seen them drunk on this "Virginia Dare vanilla." "The last man that was drunk on it was a barber at Hamlet." The State introduced the bottles of extracts testified to above.

The chief of police then went on to say, "The defendant said he was there for the purpose of taking orders and selling it. He had orders for these extracts for sale at other places, but this (Terry's) was the only place I saw him. He showed me his order book; it was full. I was about to take his order book from him, but he said he had been taking orders, and I let him take it back. Yes; he was offering these as flavoring extracts. As I stated, he and Mr. Terry were discussing it. Mr. Terry said they were discussing whether it was legal or not for him to sell that stuff. When I stated that I had seen some one drunk off that vanilla extract, that was before I saw Mr. Barksdale. When that man was arrested and told me he was drunk on it, I went to the merchant that sold it and told him not to sell any more."

The defendant testified that, "This was not my first visit in Hamlet. On this occasion I was trying to sell my extracts. I went to four or five stores and every store I went in they told me (answer objected to). I did not make any sales. I was offering these extracts for flavoring purposes. I had my samples full—from three of a pint on up to a pint. . . . Yes; I was soliciting his order."

Dr. B. H. Smith, witness for the defendant, testified that he lives in Brooklyn, N. Y., and is in the employ of Garrett & Company. He further testified that he had been with Garrett & Company about two years "They have on hand in Brooklyn some wine—a large quantity, comparatively speaking. The company does extract the alcohol from this wine, but I do not have charge of that." In corroboration of this, it was published in New York papers 29 March, 1921, and broadcast over the country by the Associated Press, that the Garrett Company had a quarter of a million dollars worth of liquor seized in Brooklyn on 28 March by the Government authorities. The witness further stated, pointing to a bottle, "That is a half pint. I do not know whether a man would have to drink all that to get drunk. Whiskey is 45 per cent alcohol. *This is about as strong as the average whiskey.* I do not know that a man could drink half of that bottle and be drunk. I am not an expert on that proposition." He further said, speaking of Garrett & Company, "We use the alcohol that has been taken from the wine. As to the brandy, it is an imitation extract of brandy. . . . Garrett & Company sent me down here to testify from Brooklyn. We are doing business in every State in the Union. . . . We do not want to be cut off from our sales down here. We would *go to considerable expense to keep it running.* Yes; Garrett & Company are *deeply interested in the outcome of this case for the effect on their business* in this county, at any rate. I had no instructions to do everything in the world to have this man acquitted. I had no instructions of any sort. Mr. Travis wired me to come down and bring the permit. He is attorney for the company. I did not confer with the manager. Mr. Garrett is head of the business. I did not confer with him. Mr. Travis had conferred with him a week or 10 days ago, and he understood what I was coming for." Dr. Smith further testified, in answer to a question by the court, "Can extracts be preserved with less than 40 per cent alcohol?" replied, "Yes; 15 per cent or 16 per cent will preserve any vegetable product."

There was other evidence, but this is the substance of the testimony directly affecting the matter before the court.

The court charged the jury: "The defendant is indicted for soliciting orders for intoxicating liquors. He has pleaded not guilty, and the law raises a presumption of innocence in his favor, which presumption continues throughout the trial until you convict him, if you do convict him. The burden of proof is upon the State, in order to convict him, to prove every essential ingredient, under the law, beyond a reasonable doubt. The law would be doing a vain thing to have the presumption of innocence in favor of the defendant and then to cast the burden of proof upon him to prove his innocence. The burden of proof required of the State is: 'Beyond a reasonable doubt'; that is, a doubt harder to define than the words imply. It means to fully satisfy you beyond a moral certainty as to the truth of the evidence you have heard introduced here before you. The court charges you that the only thing you have to consider in this case is the truth of the State's evidence, and by reason of the defendant's plea he denies the truth of the State's evidence, and says by his plea, which the law authorizes him to make, that all the State has offered is not true. So, gentlemen, if you have no reasonable doubt as to the truth of the State's evidence offered in this case, and have no doubt, that is, no reasonable doubt, as to the truth of what the witnesses have sworn to for the State, and you believe their testimony beyond a reasonable doubt, then the court directs you to return a verdict of guilty. In addition to what the court has already charged you, it will add that if you believe all the testimony for the State, as it has instructed you, and including that of the defendant, that you will return a verdict of guilty." The jury found the defendant guilty.

The statute under which the defendant was indicted, Laws 1908, ch. 118, sec. 1, now C. S., 3370, reads as follows: *"Unlawful to solicit orders for liquor.* It is unlawful for any person, for himself or as agent or traveling salesman, for any person, firm, or corporation, to solicit orders or proposals of purchase of intoxicating liquors by the jug or bottle or otherwise in the State of North Carolina"; and Laws 1908, ch. 71, sec. 2, now C. S., 3368, defines intoxicating liquors as follows: "All liquors, or mixtures thereof by whatever name called, that will produce intoxication shall be construed and held to be intoxicating liquors within the meaning of *this* article." *"This* article" is article 1. There is a proviso thereto which excepts only medicinal preparations manufactured according to prescribed formula. The defendant admitted that he solicited orders for his preparations, and that they might produce intoxication. The chief of police testified that he "had seen men drunk on this preparation," and Dr. Smith, witness for the defendant, testified that "whiskey is about 45 per cent alcohol. *This is about as strong as the average whiskey,"* and added that he did not know personally that a man could drink half of that half-pint bottle and be drunk. He further testified that the alcohol in these preparations had been taken from wine.

The charge of the judge to the jurors that "If they believed the evidence, beyond a reasonable doubt, the defendant was guilty," was correct under the statute, C. S., 3368, which provides that "liquor which will intoxicate is intoxicating liquor." Besides, this is a self-evident fact. The jury could not possibly have returned any other verdict and the judge could not have charged correctly in any other way than he did. The only suggestion to the contrary is that in another article (2) of that chapter, in regard to "the sale of near-beer and other specified drinks," sec. 3375 provides: *"This* article (2) shall not be construed to forbid" the sale of certain articles named, principally medicinal, or "the sale of flavoring extracts or essences when sold *as such,"* the sale of medical preparations, etc., and it is contended by the defendant that the words "as such" in article 2, to which alone this section, 3375, refers, shall be transported into section 3868, which applied to all the sections in article 1, and therefore the sale of flavoring extracts, it is argued, is valid notwithstanding they will make men drunk and contain admittedly 40 per cent alcohol, which every man knows will intoxicate.

An English statesman once declared in Parliament that he could "drive a coach and six through any act of Parliament," but if the words *"as such"* have such a powerful effect that they authorize the sale of any liquor that will intoxicate notwithstanding the provisions in the act of 1908, which was ratified by the people of this State on a referendum, this will vitiate the Eighteenth Amendment, which was put into the United States Constitution by the authority of the 105 millions of people of the whole Union, and the Volstead Act, enacted in pursuance thereof. It is not a mere "coach and six," but T. N. T., or that more powerful preparation recently invented, for it has blown up and destroyed absolutely the practical enforcement of the prohibition of liquor by the State Government, and has destroyed the Eighteenth Amendment so far as this State is concerned. It has left not a fragment behind.

It is not reasonable to suppose that the Legislature intended to give such a tremendous import to the words "as such," especially as it limited its meaning to article 2, and it does not apply at all to article 1, under which the defendant was indicted. Why not follow the limitation imposed by the Legislature?

But if the Legislature did pass C. S., 3375, knowingly with intent thereby to destroy efficient prohibition legislation in the State, then the words "as such" have since been stricken out of the statute by the Eighteenth Amendment, as to which the U. S. Supreme Court held, *Rhode Island v. Palmer,* 253 U. S., 386, that it *strikes down* any and every provision in a state constitution or statute which authorizes, or sanctions, what the Eighteenth Amendment forbids, saying: "It is operative throughout the territorial limits of the United States, binds all legislative bodies, courts, public officials, and individuals within those limits and of its own force invalidates every legislative act—whether by Congress, by state legislatures, or by territorial assemblies," and even if the words "as such" had been intended to repeal the provisions of the act of 1908 which made all liquor that would intoxicate, intoxicating liquor, which any one was indictable for offering to sell, then the Eighteenth Amendment has now stricken "as such" out of the statute.

As to the Nineteenth Amendment, we know that of its own force and vigor it struck out of every state constitution the word "male," and that women are entitled to vote and hold office in North Carolina notwithstanding the word "male" has not been taken out of our Constitution by any act of its people.

The usual method of selling flavoring extracts is in very small bottles, 1 ounce or 2 ounces, and it is bought by the ladies of the household. The testimony here is that this article carrying 40 per cent alcohol, and, in the language of the defendant's witness, *"as strong as the average whiskey,"* was sold in pint bottles and even in quarts and gallon containers, and in the nature of things it was not sold "as such," even if those words had any effect. The defendant's witness, Dr. Smith, could not say that a half-pint bottle of this so-called extract did not intoxicate.

If, however, the words "as such" have authorized the sale of "grape extract," "apricot brandy," "rum extract," Virginia Dare vanilla extract," containing 40 per cent alcohol, and their "apple extract" and the like, then every saloon keeper may well resurrect himself and his place of business. All that is necessary to be done is to stretch a banner across the front of his resurrected saloon and advertise, "Brandy and other extracts, all carrying 40 per cent alcohol or more, called flavoring extracts," and add that the sale is guaranteed from interference by the words "as such," and sell in pint bottles or any other quantity, as desired. As this 40 per cent alcoholic mixture makes men drunk in Hamlet, it will surely do so in Raleigh, and men will be found lying drunk about the streets of Raleigh as they were in Hamlet, and the same results will happen throughout the State.

It will be useless for the courts to try men for violation of the law in selling whiskey which may be 45 per cent alcohol or less when without risk they can buy it as "flavoring extracts" if sold as such, containing 40 per cent, or why not 50 per cent, and be immune.

It will no longer be necessary for the bootlegger to take his customer up a dark alley or make his sale in the back room of some brothel or other place of evil repute when he can boldly reopen his saloon on Fayetteville street in Raleigh, or on the main street of any city in the State, and sell brandies and other decoctions all carrying 40 per cent alcohol, and be protected from liability by selling them as "flavoring extracts."

Dr. Smith, witness for the defendant, testified that he was in the employ of Garrett & Company, and that they had a large quantity of wines on hand from which they derived the alcohol of which he put 40 per cent into these extracts. It was useless for them to allow the seizure of their quarter million dollars of their wines by the Government when they could have been shipped off to North Carolina and sold at will by their traveling agents, as in this case, by virtue of these magical words "as such" in a legislative statute.

Recently three outlaws, carrying a truck load of intoxicating liquors, shot down in the streets of Greensboro, McCuiston, one of the best policemen of that city, leaving his wife and several children to mourn his loss. That act was entirely useless even for the purposes of the outlaws, since all they had to do was to bring over the truck from Danville loaded down with "brandy extract," "apricot brandy," and other brands carrying 40 per cent alcohol, "equal," in the language of the defendant's witness, "*to the average whiskey* in strength," and place a placard on the truck that they were protected because they were selling flavoring extracts "as such," for neither McCuiston nor any other policeman would have dared interfere if this was lawful.

This is not the question whether the defendant was selling his 40 per cent alcohol in good faith as a flavoring extract. No doubt it was an efficient flavoring extract, and the defendant did not deny that it would make a man drunk, but said that was "a matter for the merchant to whom he sold it." It is not a question of the good faith of the defendant, but whether he was violating that law which the people of this Union and of this State have found necessary to enact for the protection of the public. Our prohibition statute, which was ratified by the people at the ballot box on a referendum, and which is therefore in effect of the dignity of a constitutional amendment, provides: "All liquors or mixtures thereof *by whatever name called* that will produce intoxication shall be construed and held to be intoxicating liquors within the *meaning of this article*." That is now C. S., 3368; and 3370, in *the same article,* provides that it is unlawful for the defendant or any one else "to solicit orders or proposals of purchase of intoxicating liquors by the jug or bottle or otherwise within the State of North Carolina." The defendant, by his own admission and by the testimony of his witness, Dr. Smith, has proven that he did this very thing. It is not a question of his good faith in believing that he was selling a good flavoring extract. But it was also intoxicating liquor upon his own evidence, and he was violating the laws of this State and of the United States.

The basis of government in every free country is the popular will, formulated into constitutions and statutes, and the welfare of the people depends upon the orderly, faithful execution of those laws unless repealed by the same power that created them.

So clear and overwhelming is the public opinion as to the corruption, the poverty, the crime, and other evils produced by the use of intoxicating liquor that in spite of the enormous power and resistance of the aggregated wealth invested in great breweries and distilleries of all kinds, and the incalculable profits of the innumerable saloons engaged in the retail business, an amendment to the United States Constitution was passed by two-thirds of both Houses of Congress and ratified by 45 state legislatures out of the 48, and this is now the supreme law of the land, which forbids the manufacture, sale, and transportation of intoxicating liquors, and of all traffic therein. This had been previously enacted in this State in 1908, and was ratified by the people by over 40,000 majority. In spite of the overwhelming necessity which in the opinion of the public required this prohibition, the counsel for the defendant contends that the words "as such" inserted in another section, in another chapter, whose application is restricted by its terms to *that* chapter, permits him to sell a mixture, by 21 different names, which the defendant's witness, Dr. Smith, testified "is as strong as the average whiskey," simply by selling it, not as whiskey—openly and frankly—but by calling it "flavoring extracts."

Upon the testimony of the defendant's witnesses alone, if believed, he was guilty, and the charge of Judge Ray was correct. The real trouble which in the language of the defendant's witness made "Garrett & Company *deeply interested* in the outcome of this case for the effect on their business," is that the judge put their man on the roads instead of imposing a fine which this millionaire corporation would have promptly paid.

It is well known that for years firms and corporations outside the State have shipped into this State, and through their agents have sold large quantities of intoxicating liquor in violation of law and as long as the courts imposed only fines, usually small ones, the custom has been for these outside violators of the liquor law to pay the fees of counsel, and pay all fines and cost laid upon their agents, which aggregate very much less than the license fees would have come to under the former system of open saloons. It is not suggested that Garrett & Company have done this, though they are defending this case.

The German Ambassador at Buenos Aires recommended his government to sink neutral ships, *spurlos versenkt*, that is, "leaving no trace," and as long as that could be done with impunity, the German undersea boats followed this advice, but when the Allies invented the "depth bomb" and U. S. put in the North Sea barrage and began to destroy these outlaws of the sea so that the sailors therein did not return to Wilhelmshaven or Kiel, the intended crews of other submarines mutinied and the war came to an end. As long as the agents of these outside companies can violate the law and sell their 40 per cent alcohol or other "mixtures, by whatever name called, that will intoxicate," and shall only have to pay occasional fines, this warfare against the will of the people, as expressed in the Eighteenth Amendment and in our own statutes, will go on, but when the courts, as in this case, begin to impose road sentences from which those companies cannot relieve their agents, they will find it difficult to get agents to face sentences which must be paid by the agents in person. Therefore, this strenuous contention has been made by the eminent and able counsel of this great corporation that the words "as such" used in article 2 of chapter 66, and which on the face is restricted to the sections in *that* article, shall apply to all the sections in article 1, and render null the provision therein that "all liquors or mixtures thereof, by whatever name called, that will produce intoxication shall be construed and held to be intoxicating liquors within the meaning of *this* article." C. S., 3368. It is an astounding proposition advanced by the eminent counsel for the defendant that the words "as such" in another article have repealed and rendered powerless this provision in this article which is the original act adopted by the referendum to the people in 1908. If so, it has also repealed the Eighteenth Amendment to the United States Constitution, and so far as that amendment is concerned, North Carolina will have practically seceded from the Union.

Liquor-selling companies will continue to pay cheerfully the fines and costs imposed upon their agents in the few cases in which they happen to be convicted, and thus "keep their business going," but the example of this practical judge from the mountains in sentencing this agent to work out 6 months of a road sentence will embarrass them, hence this strenuous defense. The imposition of a few fines upon their "agents," and the sentencing to the roads of a few "poor whites and niggers," will not concern these nonresident establishments, but when road sentences are put upon pleasant-faced, nicely-dressed agents of nonresident corporations who are making vast sums by violation of both State and Federal laws in selling alcoholic mixtures it will cut down the profits of their business.

The plain, common-sense meaning of the statutes, construed together, is that flavoring extracts can be sold when *bona fide* they are such, *provided*, that "such mixture, by whatever named called," will not intoxicate. This construction repeals neither section, and is consonant to the settled rules of construction of statutes. The defendant and his witness admitted this mixture had 40 per cent alcohol, and did not deny that it would intoxicate. The chief of police testified, and he is not contradicted, that men did get drunk on the defendant's "vanilla extract," and were put in jail. That is the whole case. Why should Congress or the courts worry about 2.75 per cent beer if it is lawful to sell 40 per cent extracts?

The act of 1908 (ratified on a *referendum*) forbade making, selling, etc., intoxicating liquor, and provided, "any mixture, by whatever name called, that will intoxicate is intoxicating liquor within the meaning of *this* act."

The act of 1911 in regard to "near beer," enacted to further restrict and not to enlarge such traffic, provided, that *that* act "shall not forbid the sale of flavoring extracts, sold as such."

If the *major* purpose of this prohibition legislation is to permit the sale of flavoring extracts, then the two provisions, read together, mean, "the sale of intoxicating liquor is illegal, but this shall not forbid the sale of flavoring extracts though they will intoxicate."

If the major purpose of the Eighteenth Amendment and of Federal and State legislation is to prohibit the sale of intoxicating liquor, then the meaning is that flavoring extracts may be sold, as such, *provided* they do not intoxicate."

Which is the chief purpose, and which is subordinate? Upon one or the other of these two standpoints the construction must be made.

Upon the evidence of the defendant's witness, taken alone, and upon the clear, unmistakable language of the statute, the defendant is guilty. The object of the defendant is doubtless to get a new trial, so that before another judge he may beg off with a fine, which his employers will cheerfully pay, for in the language of their own witness and employee, Dr. Smith, "They will go to *considerable expense* to keep the business going." Of course.

The defendant and his witness testified that he was offering 21 different mixtures "as flavoring extracts," bearing 40 per cent alcohol, and different names. If these can be sold, where is the limit? Suppose, in fact, mixtures carrying 50 per cent or 60 per cent alcohol are offered as "flavoring extracts." Dr. Smith said that these extracts were "as strong as the average whiskey." Any other manufacturer can sell flavoring extracts, bearing different names and possibly a higher per cent of alcohol, and *"as such"* shops can spring up all over North Carolina in place of the old "bar rooms," "saloons," and "corner groceries."

The Eighteenth Amendment is a constitutional provision, and if there were any conflict between it and our constitutional provision for trial by jury, the Eighteenth Amendment is of the higher dignity. But there is no conflict between them. The Eighteenth Amendment forbids the manufacture, sale, or transportation of intoxicating liquor. When, therefore, the defendant and his witnesses testified that this mixture was 40 per cent alcohol—and as strong as the average whiskey—and the State's witness testified that it had made several men drunk who were put in jail for it, the judge could do no less than tell the jury if they believed the evidence for the State and the defense to find the defendant guilty. *S. v. Fore* (*Allen, J.,* for a unanimous Court), 180 N. C., 744; *S. v. Reed, ante,* 508; *S. v. Pearson* (top of page), *ante,* 589.

STATE v. H. B. JOHNSON.

(Filed 7 June, 1921.)

1. **Spirituous Liquors—Intoxicating Liquors—Automobiles—Forfeiture—Ownership.**

   The principle requiring a strict construction of a statute creating a forfeiture or in derogation of a common-law right applies to C. S., 3304, requiring a seizure and sale of the defendant's right, title, or interest in an automobile unlawfully used in liquor traffic, and such seizure may not be extended by implication to apply to the seizure of an automobile, owned exclusively by some person other than the defendant, and who is innocent of the offense or complicity therein.

2. Same—Principal and Agent—Interpleader.

Where the owner of automobiles for hire has instructed his drivers not to use them in connection with the traffic in spirituous liquors, and one of them, without his knowledge, has disobeyed the order, the doctrine of *qui fecit per alium*, or *respondeat superior*, does not apply, and he may intervene, where the driver is alone tried and convicted, and regain possession of the automobile and establish his title thereto. C. S., 3304.

3. Same—Trials—Constitutional Law.

Where the driver of an automobile has been indicted for the unlawful use of the owner's automobile in the liquor traffic, and the owner himself establishes his innocence of the offense, upon interpleader, the statute, C. S., 3304, does not deprive him of title to the machine exclusively owned by him, and a conviction would have the effect of condemning him of committing the offense without affording him a trial thereof.

CLARK, C. J., dissenting.

APPEAL by J. H. Creasman, intervener, from *Adams, J.*, at March Term, 1921, of HENDERSON.

The defendant, H. B. Johnson, was tried and convicted under an indictment charging him with having in his possession and transporting spirituous liquors in violation of law; and the automobile, used by the defendant for transporting same, was sought to be condemned and forfeited as provided by statute. After the defendant had been tried and convicted, J. H. Creasman intervened and claimed title to the automobile. Upon the hearing of this intervention, the court found the facts and entered the following judgment:

"This is a motion made by J. H. Creasman for the return to him of an automobile seized by the sheriff of Henderson County, for the violation of the liquor laws by the defendant, while the said car was in H. B. Johnson's actual possession.

"At the request of the defendant, the court finds the facts in this case, which are as follows:

"1. The defendant, H. B. Johnson, at the present term of this court, was duly convicted by a jury for the unlawful transportation of spirituous liquor from Henderson County to the city of Asheville.

"2. That J. H. Creasman is engaged in the automobile public-service business, with his principal office at the Langren Hotel, in the city of Asheville, and was the owner of the Studebaker car seized by the sheriff of Henderson County, while in the possession of the defendant, H. B. Johnson.

"3. That on 24 February, 1921, the defendant, H. B. Johnson, was in the regular employ of said J. H. Creasman, acting in the capacity of chauffeur for said Creasman, and that said Creasman had in his employ approximately ten other chauffeurs at the time the car was seized.

"4. That on 24 February, 1921, T. B. Whitaker and Charles McCurry employed the defendant, H. B. Johnson, as Creasman's employee, to drive said car from Asheville to a certain place in Henderson County, and agreed to pay for the hire of said car at the rate of four dollars an hour for the trip to Henderson County and the return to Asheville.

"5. That said Creasman had no knowledge that the car was hired for the purpose of transporting liquor, and he had directed and instructed all his chauffeurs, including the defendant Johnson, not to carry persons in any of the automobiles operated by him who had whiskey in their possession or who were in any way using whiskey.

"6. That when the said automobile was seized by the sheriff, the defendant Johnson was operating said car for the benefit of said Creasman in the course of his employment and in furtherance of said Creasman's business, at the agreed price of four dollars an hour.

"7. That the sheriff of Henderson County took said car into his possession, as provided by sections 3403, 3404, and 3405 of the Consolidated Statutes, for a breach of the prohibition laws by the defendant, H. B. Johnson, and that four gallons of liquor were in said car at the time the car and liquor were seized by the sheriff, and defendant was transporting said liquor in violation of law.

"8. That said sheriff has kept said car in his possession from the date of its seizure until the present term of this court, and until the defendant was convicted of the unlawful transportation of liquor, and that said sheriff now has said car in his possession.

"Upon the foregoing facts the court is of the opinion that the said J. H. Creasman has forfeited and lost all right, title, and interest in and to said car; and it is ordered and adjudged that the sheriff of said county proceed to advertise and sell said car, under the laws governing the sale of personal proper under execution, and that the proceeds be applied as provided by law.

"This 11 March, 1921. W. J. ADAMS,
Judge Presiding."

From this judgment the intervener appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Philip C. Cocke for intervener.

STACY, J. Section 3403 of the Consolidated Statutes, under which it is contended the intervener's automobile should be forfeited, in part provides: "If any person . . . shall have or keep in possession any spirituous, vinous, or malt liquors in violation of law, the sheriff or other officer . . . who shall seize such liquors . . . is hereby authorized and required to seize and take into his custody any . . . automobile . . . used in conveying . . . such . . . liquors and safely keep the same until the guilt or innocence of the defendant has been determined upon his trial for the violation of any such law making it unlawful to so keep in possession any spirituous, vinous, or malt liquors, and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title, and interest in and to the property so seized."

It will be observed that, under the provisions of this statute, the automobile or property itself is not condemned and forfeited, but only the *right, title, and interest of the defendant* in and to the property so seized. The defendant, H. B. Johnson, had no right, title, or interest in the automobile, and the intervener, J. H. Creasman, was not a defendant or party to the proceeding. Hence, we think the owner's petition for a release of the property should have been granted.

The Federal law upon this subject, with respect to the question of forfeitures, is different from our State law in that under the National legislation the property itself, the *res,* and not merely the defendant's right, title, and interest therein is condemned and forfeited when the same is used by any one in the forbidden way. *Bush v. United States,* 24 Fed., 917; *United States v. Mincy,* 254 Fed., 287. Hence the Federal decisions, based upon statutes which authorize a seizure and condemnation of the property without regard to its ownership or management, afford no guide or rule of construction in interpreting our own laws. Indeed, we are well assured that no court of competent jurisdiction would be disposed to extend a penal statute, by implication or otherwise, to include a forfeiture beyond the clear import of its provisions. The case of *Daniels v. Homer,* in our own reports, 139 N. C., 219, fully recognizes this principle, and is in keeping with the authorities where the statute provides that the property, so used in offending, shall be seized and sold. This distinguishes it from the case at bar. "Forfeitures are not favored in the law. Courts always incline against them." *Farmers Bank v. Dearing,* 91 U. S., 29. In Southerland's Statutory Construction, 547, the rule is stated as follows: "If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed," citing numerous authorities in support of the text. To the same effect are our own decisions: *McGloughan v. Mitchell,* 126 N. C., 683; *Coble v. Shoffner,* 75 N. C., 43; *Smithwick v. Williams,* 30 N. C., 268.

In answer to the contention of the State that the intervener should be held liable to the acts of his agent under the doctrine of *qui facit per alium facit per se,* or *respondeat superior,* it is sufficient to say, at least for the purposes of this appeal, that he has not been indicted or made a party defendant; and we have found no provision in the statute by which a master may be punished for the acts of his servant without giving him an opportunity to be heard. The law provides that "the *defendant* shall forfeit and lose all right, title, and interest in and to the property so seized," and this is as far as the Legislature has gone. We can go no further. As said by *Gray, C. J.*, in *Ex parte Robinson*, 131 Mass, 376: "It is hardly necessary to add that our duty is limited to declare the law as it is; and whether any change in that law would be wise or expedient is a question for the Legislature, and not for the judicial department of the Government." See, also, *In re Applicants for License*, 143 N. C., 1; *S. v. Lewis*, 142 N. C., 626; and concurring opinion in *Wilson v. Jordan*, 124 N. C., 683.

The particular statute now under consideration was before the Court in *Skinner v. Thomas*, 171 N. C., 98, and we content ourselves by referring to that case as a controlling authority. Let judgment be entered directing the sheriff to return the property in question to the intervener.

Error.

CLARK, C. J., dissenting: This is an appeal from an order condemning the automobile which was used by the defendant Johnson in the illicit transportation of spirituous liquors. The appellant and intervener, J. H. Creasman, is engaged in the automobile service business in the city of Asheville, and is owner of the car seized by the sheriff while in possession of said Johnson, who was one of about ten drivers who were regular employees of Creasman at the time the car was seized. Johnson, as Creasman's employee, drove the car, which he then had in charge, from Asheville to a point in Henderson County for T. B. Whitaker and Charles McCurry, who hired said car at $4 an hour for the round trip.

C. S., 3403, provides: "If any person shall have or keep in possession any spirituous, vinous, or malt liquors in violation of law, the sheriff or other officer who shall seize such liquors is hereby authorized and required to seize and take into his custody any automobile used in conveying such liquors, and safely keep the same until the guilt or innocence of the defendant has been determined upon his trial for the violation of any such law making it unlawful to so keep in possession any spirituous, vinous, or malt liquors, and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title, and interest in and to the property so seized."

Although Creasman had no knowledge that the car was hired to transport liquor, and he may have instructed all his drivers, including the defendant Johnson, not to carry persons who had whiskey in their possession or were using whiskey, it was his property that was being used for an unlawful purpose and while on a criminal indictment the owner of the automobile may not be liable for such conduct on the part of his employee, it is otherwise as to civil liability as to which the principal is responsible for the conduct of his agent. If the defendant Johnson, while operating this machine for the owner, had negligently run over and injured any one the owner of the automobile would be liable in damages, which would not necessarily be restricted even to the value of the machine.

Skinner v. Thomas, 171 N. C., 98, is not in point. In that case the intervener was not, as in this, the owner of the machine, but merely a mortgagee. He had no control of the custody of the machine, and did not put it in the power of the driver to carry the illicit spirituous liquor, and this Court held the machine was not forfeitable.

In this case, Creasman, as in *S. v. Kittelle,* 110 N. C., 560, was duly licensed and was responsible civilly, at least, for the illegal use of the machines he was licensed to use. In *Skinner v. Thomas, supra, Allen, J.,* says that the plaintiffs not only had no knowledge of the illegal use of the automobile, but that they were not connected in any way with the intoxicating liquor, or *with its transportation.* In this case Creasman was duly authorized to carry on the business of operating automobiles. He had ten drivers, and for the illegal use of this automobile in the transportation of liquor his agent received $4 per hour, which money, presumptively at least, went into the receipts of Creasman. This made him liable civilly to the penalty for the illegal use of the machine to the same extent as if he had driven the machine. *Qui facit per alium, facit per se* is an age-old maxim as to civil liability. It was Creasman's machine that illegally carried the spirituous liquor. The money received from the service went into the receipts of Creasman's business, and if he had driven the machine himself he would have been liable to the forfeiture of the property; it is therefore liable to forfeiture, which attends upon such use by his agent, into whose possession he entrusted it. In *Skinner v. Thomas, supra,* the mortgagee did not commit the machine to the custody of the man who used it for the illegal transportation of liquor. But Creasman did, and the machine was subject to the same liability in the hands of his agent as it would have been if Creasman had driven the machine himself.

The forfeiture of automobiles or other vehicles engaged in the unlawful transportation of liquor has been sustained universally in the Federal courts, and in a very large number of the State courts, irrespective whether the machine was being operated in the illicit business by the owner, or by an employee without the knowledge of the owner as to the transportation of the liquor. See annotations in 10 A. L. R., 1591-1594. The authorities are also summed up in 21 R. C. L., sec. 117, p. 1937. They seem to be in conflict whether the principal, the owner of the machine, is criminally liable when the violation is by his employee operating the machine by his authority when the owner either has no knowledge of the illegal transportation of liquor or has forbidden its use for that purpose. The weight of the authorities hold that the machine under such circumstances is forfeitable.

The Federal authorities are uniform as laid down in *U. S. v. Mincey*, 5 A. L. R., 211, and notes 213-216, as follows: "An automobile which is entrusted to an employee for transacting business for his employer is subject to forfeiture if the employee uses it without the knowledge or consent of the owner to transport intoxicating liquor in violation of law."

There is also a very full citation of authorities as to the master's responsibility civilly and criminally for the illegal conduct of the employee, in the conduct of the business, in the very full notes to *Com. v. Sacks* (Mass.), 43 L. R. A. (N. S.), 16 *et seq.*

In *S. v. Kittelle*, 110 N. C., 560, it was held that a licensed liquor dealer was criminally responsible for the unlawful sale of liquor by his agent to minors, although such sale was against his instructions and without his knowledge. This was on the ground that being a licensed dealer he was responsible for the manner in which the business was conducted. Otherwise, evasion of the law would be easy.

In this case Creasman was a licensed operator of machines, in which he employed ten drivers for his vehicles, and certainly to the extent of the property thus used should be held subject to the liability incurred by such illegal use irrespective whether the owner was driving the machine or the liquor was transported by another whom he placed in charge of the machine. If this machine is exempt from forfeiture, because it was driven by an agent, the opportunity thus afforded will nullify the penalty.

The penalty prescribed by the statute is one of the provisions that the law-making power found necessary to enact in order to suppress the illicit transportation of spirituous liquors. This penalty is not intended to be laid upon the chauffeur, the driver. The punishment prescribed for him is fine and imprisonment. The penalty of forfeiture was intended solely against the owner of the machine against whom there is no fine or imprisonment. To hold that the "defendant" referred to in that part of the statute applies to the defendant in the criminal action and not to the defendant in the proceeding to attach and forfeit the property is to ignore the sole object of the statute, which, as just said, is not to punish the driver, against whom there is already sufficient provision, but to reach the owner of the machine when he is not the driver.

In the construction of such statutes the cardinal principle is to consider the evil intended to be remedied and the remedy prescribed which in this case is by forfeiture of the machine used in the illicit traffic and thereby to reach the owner and to make him responsible, not criminally, nor without limitation, but to the extent of the property which he has put it in the power of the driver of the machine to use for the illegal purpose.

This State long ago recognized that one of the greatest evils to be guarded against was the traffic in liquor which made so many widows and orphans, and is the fruitful source and cause of crime and of poverty. The enormous profits made by the violation of the law in this respect is a great temptation to violate the statute and evasions have been many and ingenious. One of the statutory remedies devised to prevent this has been to provide that when a vehicle is used in the violation of the law it shall be forfeited. The object is to make owners thereof careful into whose hands they entrust these rapidly moving machines. The forfeiture of the machines will be more effectual than fines and imprisonment of the drivers.

In *Daniels v. Homer,* 139 N. C., 219, this Court held that an act which authorized the forfeiture of nets used in violation of law was constitutional, citing *Lawton v. Steele,* 152 U. S., 133, to the same effect and numerous other cases.

In Wharton Criminal Law (11 ed.), p. 359, it is said: "A principal is *prima facie* liable for the illegal acts of an agent in the general course of his business, and this is eminently the case in indictments for nuisance which could not be abated if the master was not liable for the servant's act in the general furtherance of the master's plan."

In *Grant v. U. S.* (Op. filed 17 January, 1921), the Court says: "There may be, indeed, greater risk to the owner of property in one form or purpose of its bailment than in another, but wrong cannot be imputed to him by reason of the form or purpose. *It is the illegal use that is a material consideration. It is that which works the forfeiture, the guilt or innocence of its owner being accidental.* If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. 'It is a thing that can be used in the removal of goods and commodities,' and the law is explicit in its condemnation of such things."

The provision that "the right, title, and interest" in such property shall be forfeited when used in the illegal transportation of spirituous liquors was intended to apply, and could apply, only to the owners thereof, irrespective whether the owner is driving the machine or not. Otherwise, it is a useless provision, for a driver who is not an owner cannot be reached by the forfeiture of the machine. The forfeiture is intended to apply to those who have "right, title, and interest" in the machine, and who can control its use. In *Skinner v. Thomas, supra,* we held that the statute did not apply to a mortgagee who did not know the use to which the machine was put. It cannot apply to a driver who is not the owner. If it does not apply to the owner, whether driver or not, of the machine the law is entirely useless, and we cannot reasonably put such construction upon the statute which was intended as a serious aid in enforcing the law and deterring from its violation. The law would be without point and useless.

In this and every other free country, the basis of government is the popular will formulated into constitutions and statutes. So fixed and overwhelming has been public opinion as to the evils of the manufacture, sale, and transportation of spirituous liquors and all traffic therein that in spite of the enormous power of the aggregated wealth invested in breweries and distilleries of all kinds and the profits of the countless saloons engaged in the retail business, the Federal Constitution now prohibits the manufacture, sale, and all traffic in spirituous liquors of all kinds. It was enacted in this State in 1908, and upon a referendum was ratified at the ballot box by over 40,000 majority. Many other states enacted similar legislation, until finally the Eighteenth Amendment to that effect was passed by a two-thirds majority of both Houses of Congress, and with great promptness was ratified by the legislatures in 45 out of the 48 states. This statute, enacted for the more perfect execution of the public will, should receive, therefore, a construction in accordance with the manifest intent and purpose of the statute, and should not be construed by any technicality, to defeat a purpose so clearly expressed and the public will so strongly defined.

When this statute, after prescribing fine and imprisonment for the person engaged in the illicit transportation of spirituous liquor, adds the forfeiture of "the right, title, and interest" in the vehicle by which the illicit transportation is affected, it cannot mean to apply to any one who has no right, title, or interest in the property. In *Skinner v. Thomas, supra,* a divided Court held that it did not apply to the mortgagee. It cannot apply, therefore, to any one except the person who has the right, title, and interest in the property, to wit: the owner, and the description of him as "the defendant" by reasonable interpretation can mean only the defendant in the proceeding to subject the property. It does not refer to, and cannot reasonably refer to, a defendant who has been convicted of the illicit transportation if he has no right or title in the offending machine.

This is not the case of a stolen automobile, operated without the authority of the owner, who, of course, in such case, would not be responsible for it being run over any one, nor for transporting liquor contrary to law.

There is a marked distinction as to the forfeiture of land on which a still is operated without the knowledge of the owner thereof (for land is not used as an instrumentality of illicit distilling), and the forfeiture of vehicles, which are used solely for transportation and for the illegal use of which the owner is liable, because he has put the means of transportation in the hands of the driver who commits the crime, and is therefore responsible civilly, at least, for his violation of law by forfeiture of the machine.

CASES FILED WITHOUT WRITTEN OPINIONS

Hutton v. Horton et al. (477)

Jordan v. Tidewater Power Company. (283)

Lamb v. A. C. L. Railroad Company. (59)

Swift & Company v. Meekins. (10)

INDEX

ABANDONMENT. See Criminal Law, 16, 17, 18, 19.

ABDUCTION.

Abduction — Actions — Parent and Child— Damages— Loss of Service— Mental Anguish.—An action will lie in behalf of the father against one who has induced his minor sixteen-year-old daughter to leave her home, against his will, in his absence and against the protest of his wife, who was then present, though with the consent of the daughter; and where the intent and result is marriage, he may recover damages against the abductor upon sufficient evidence for the loss of his daughter's services between the time of her abduction and that of her marriage, and for the mental anguish he has sustained, or for either one or both as the case may be. *Little v. Holmes*, 413.

ABORTION. See Criminal Law, 2.

ABROGATION. See Contracts, 12.

ABUTTING OWNERS. See Counties, 1.

ACCEPTANCE. See Carriers of Freight, 6; Compromise, 1; Gifts, 10.

ACCESSORIES. See Intoxicating Liquors, 6.

ACCORD AND SATISFACTION. See Compromise, 1.

ACCOUNT. See Actions, 7; Evidence, 14; Issues, 2.

ACTIONS. See Judgments, 7; Municipal Corporations, 7; Criminal Law, 17; Taxation, 1; Abduction, 1; Deeds and Conveyances, 27; Insurance, Fire, 1.

1. *Actions—Ejectment—Deeds and Conveyances—Cancellation—Cloud on Title—Equity.*—An action to set aside voidable deeds under which the defendants in possession claim the lands in controversy, and for the possession of the land, is one in ejectment, the remedy of cancellation being ancillary to the main relief sought to remove a cloud upon the title, and to recover the *locus in quo*. *Butler v. Bell*, 85.

2. *Actions—Parties—Causes of Action—Statutes—Demurrer—Pleadings.*—Causes of action may not be united under the provisions of C. S., 507, except those for the foreclosure of mortgages, unless they affect all the parties thereto, nor can they be divided under C. S., 516, when there is a misjoinder both of parties and causes of action, and when there is a cause of action alleged against one defendant assigned by him to one of the plaintiffs, and a breach of a separate contract made by him with both of the plaintiffs, and also a breach of another contract made with one of the plaintiffs, a demurrer thereto for misjoinder of parties and causes of action is good. *Roberts v. Mfg. Co.*, 204.

3. *Actions—Suits—Divorce—Venue—Statutes.*—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by Rev., 1559, under the title of "Venue," pro-

ACTIONS—*Continued.*

viding that the summons be returnable to the county wherein the applicant resides, and by amendment, chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendant resides. *Wood v. Wood*, 227.

4. *Same—Demurrer.*—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his residençe, is bad. *Ibid.*

5. *Actions—Pleadings—Equity—Multiplicity of Suits—End of Litigation.* The intent and purpose of our code system of pleading is to enable parties to determine and settle their controversies in one action, the law favoring the ending of litigation and avoiding multiplicity of suits. *Sewing Machine Co. v. Burger*, 242.

6. *Actions—Indebitatus Assumpsit.*—In the absence of a special contract, or unless in contravention of some principle of public policy, whenever one man has been enriched or his estate enhanced at another's expense under circumstances that in good conscience call for an accounting between them, the common-law action of *indebitatus assumpsit* may ordinarily be maintained against the wrongdoer for the amount shown to be justly due. *Morganton v. Millner*, 364.

7. *Same—Account Stated—Contracts—Fraud—Mistake.*—Where men who have had business dealings with each other have come to a full accounting and settlement purporting to cover transactions between them, such adjustment has the force and effect of a contract, and may not be ignored or impeached except by action in the nature of a bill in equity to surcharge or falsify the account for fraud or specified error. *Ibid.*

8. *Same—Taxation—Municipal Corporations.*—Where a city brings action against a taxpayer and its former manager presenting the question as to whether the taxpayer has paid his taxes, or whether the manager had collected them and failed to account to the city, and there is evidence tending to show that an accounting had been had between the duly accredited agent of the city, acting in its behalf, and its manager, including the amount in suit, the principles relating to an account and settlement apply. *Ibid.*

ACT OF GOD. See Evidence, 13; Negligence, 3.

ADMISSIONS. See Pleadings, 1; Libel and Slander, 2, 4; Evidence, 3, 8, 14; Issues, 2.

ADVERSE POSSESSION. See Deeds and Conveyances, 14; Equity, 1; Appeal and Error, 37; Limitation of Actions, 5, 7.

AFFIDAVITS. See Deeds and Conveyances, 2; Appeal and Error, 17.

AGENCY. See Carriers of Passengers, 5.

AGREEMENT. See Bills and Notes, 3; Appeal and Error, 23; Contracts, 12.

AGRICULTURAL DEPARTMENT. See Contracts, 15.

ALLOWANCES. See Clerks of Court, 2.

AMBIGUITY. See Statutes, 1; Wills, 17.

AMENDMENTS. See Constitutional Law, 2, 8, 15, 23, 27; Removal of Causes, 6; Pleadings, 4; Intoxicating Liquors, 10.

ANALYSIS. See Contracts, 15.

ANSWERS. See Pleadings, 1; Verdict, 2.

APPEAL. See Courts, 14, 16, 21.

APPEAL BOND. See Courts, 21.

APPEAL AND ERROR. See Railroads, 8; Intoxicating Liquors, 3, 8, 12; Evidence, 11, 19; Issues, 1, 2; Judgments, 3; Criminal Law, 13; Indictment, 1; Homicide, 1, 3, 4, 5, 11; Trespass, 1; Trials, 1, 3; Pleadings, 1; Contracts, 19; Bills and Notes, 2; Evidence, 1, 2, 13, 14; Instructions, 1, 3, 6; Limitation of Actions, 1; Principal and Agent, 1; Verdict, 1, 4.

1. *Appeal and Error—Harmless Error—Evidence—Contracts—Trials.*—Mere error in the trial of a cause will not be considered as reversible error unless made to appear to have been material and prejudicial to appellant's right; and where damages are sought as a counterclaim to plaintiff's action on contract, involving the plaintiff's failure to ship a specified amount of cotton yarns at a certain price, the damages claimed by defendant being those occasioned by a rising market, it is harmless error for the court to admit evidence of defendant that it had bought from another mill yarns at a certain higher price, when in corroboration of other testimony that it was necessary to pay this price to supply the deficiency, caused by plaintiff's breach. *Cotton Mills v. Hosiery Mills*, 33.

2. *Same—Instructions.*—Where the damages sought for the breach of plaintiff's contract, by counterclaim, are the difference between the contract price and the market value of cotton yarns at the time of the alleged breach, and the court has properly charged the jury accordingly, and there is evidence that the price of the yarns has continued to advance, it is harmless error to admit on the trial in corroboration, the price of the yarns at that time. *Ibid.*

3. *Appeal and Error—Harmless Error—Evidence—Deceased Persons—Statutes.*—The admission of evidence concerning transactions or communications with deceased persons, forbidden by our statute, is, at least, harmless error when both parties to the action have testified to them, without objection, and the objection upon which the exception is based, was subsequently taken. *Smith v. Allen*, 56.

4. *Appeal and Error — Rehearing — Petition—Reasoning — Husband and Wife—Venereal Disease—Assault.*—The reasons for denying a petition to rehear in the Supreme Court are not usually set out. STACY, J., in denying this petition states his own opinion as to why the petition should be denied owing to the wide difference of opinion of the bench and bar as to whether the wife's action may be maintained against her husband for willfully and deliberately infecting her with a loathsome disease. *Crowell v. Crowell*, 66.

5. *Appeal and Error—Assignments of Error.*—An assignment of error should comply with the rule of court in setting out therein the evidence to which objection is made. *Boone v. Sykes*, 143.

APPEAL AND ERROR—*Continued.*

6. *Appeal and Error—Instruction—Evidence—Harmless Error.*—A statement of a party's contention by the trial judge with instruction that it was not supported by the evidence, cannot be construed on appeal to prejudice the other party, upon the idea that it tended to create an impression unfavorable to him. *Cotton v. Fisheries Co.,* 151.

7. *Appeal and Error — Judgments — Attachment — Sales — Purchasers—Motions—Void Judgments.*—Where a judgment of a justice of the peace has been set aside after the sale of the defendant's property in attachment, the plaintiff may not complain that in setting aside the sale the judgment undertook to protect the rights of purchasers thereat. *Herndon v. Autry,* 271.

8. *Appeal and Error—Issues—Assignment of Error.*—Where the refusal of the trial judge to submit issues tendered is excepted to, these issues should be set out in the assignment of error for them to be considered on appeal. *Dalrymple v. Cole,* 285.

9. *Appeal and Error—Stare Decises—Law of the Case.*—The decision of the Supreme Court is the law in the particular case decided unless changed in the course and practice of the courts. *Public-Service Co. v. Power Co.,* 357.

10. *Appeal and Error—Record—Settlement of Case—Signature of Judge—Agreed Statement.*—In order that a case on appeal may be considered, the record should contain a proper statement of the case sought to be determined in the Supreme Court, which is fatally defective unless there is an agreed case properly set out in the record, or where the judge has not signed what purports to be the case he has settled for the parties. *Ingram v. Power Co.,* 359.

11. *Appeal and Error—Record—Statement of Case—Contention of Counsel.*—Matters in dispute between the appellant and the appellee as to admissions or agreements will not be considered by the Supreme Court on appeal, it being required that the case on appeal, properly presented, shall determine all such matters, and not a verbal controversy between counsel. *Ibid.*

12. *Same—Case Remanded.—Held,* the record not being altogether clear as to certain facts occurring on the trial in this case, it is remanded to the Superior Court for the appellant to request the judge, who presided at the trial, to fix a time and place for the hearing, so that he may find the material facts disputed at the hearing, if such may be desirable or possible. *Ibid.*

13. *Same—Printing—Supplemental Order.*—Where a case on appeal is remanded to the Superior Court judge to make the case more definite or more full as to matters disputed in the Supreme Court, this Court may not require the entire record to be printed again if found to be correct, for in such event a supplemental order may suffice. *Ibid.*

14. *Appeal and Error—Supreme Court—Equity—Bill of Peace—Pending Suits—Injunction—Statutes.*—A judgment of the Superior Court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon defendant's appeal, actions pending in the Superior Court involving the same equity and the same subject-matter, where

APPEAL AND ERROR—*Continued.*

the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. C. S., 1412. *Milling Co. v. Mills Co.*, 362.

15. *Appeal and Error — Harmless Error — Negligence—Verdict—Principal and Agent—Parent and Child.*—Where there is evidence sufficient to hold the father answerable in damages caused by the negligence of his minor son in driving his automobile, in an action against them both, the error of the court in sustaining a motion of nonsuit as to the father will not be held for reversible error when the jury has answered the issue of the negligence of the son adversely to the plaintiff. *Burris v. Litaker*, 376.

16. *Appeal and Error—Objections and Exceptions—Instructions.*—In order to have the Supreme Court consider an exception based upon the failure of the trial judge to direct a verdict upon an issue should they believe the evidence, it is necessary that a prayer for instruction to that effect had been aptly tendered and refused. *Ibid.*

17. *Appeal and Error—Service of Case—Affidavit—Counter Affidavit—Certiorari.*—An affidavit of counsel that time had been agreed upon for preparing and serving his case on appeal will be considered in the Supreme Court on appellee's motion to dismiss, where uncontradicted by counter affidavit, and the motion will be disallowed, and a *certiorari* will issue, where appellant shows merits. *Justice v. Lumber Co.*, 390.

18. *Same—Settlement of Case.*—Where the trial judge has not sufficiently passed upon the appellant's exceptions to the report of a referee, and has unsuccessfully endeavored to draw a judgment satisfactory to the parties, which was to be first submitted to them before filing, and has inadvertently failed to notify the appellant of its filing, who was not satisfied therewith and desired to appeal, his exceptions presenting serious legal questions for final adjudication, the Court will remand the case to afford the appellant opportunity to be heard upon his exceptions by the trial judge, and to have him settle the case on appeal, in the course and practice of the court, upon the refusal in the Supreme Court of the appellee's motion to dismiss. *Ibid.*

19. *Appeal and Error—Reference—Superior Court—Affirmance of Report—Evidence.*—The Supreme Court will not, on appeal, pass upon the affirmance by the trial judge of facts found by the referee, upon supporting evidence. *Ibid.*

20. *Appeal and Error—Docketing of Case—Superior Courts—Order Extending Time for Docketing.*—While the trial judge may not extend the time of appellant to file his case on appeal, except by consent, this consent is presumed when the order for an extension is filed or is of record. *Ibid.*

21. *Appeal and Error—Instructions—Conflicting Constructions—Reversible Error.*—Where parts of the instructions given by the court are materially in conflict, the jury is left in doubt as to the law applicable to the case, and it constitutes reversible error. *Comrs. v. Jennings*, 393.

22. *Appeal and Error—Objections and Exceptions—Negligence—Evidence Admitted Without Objection—Questions for Jury—Trials.*—The prin-

APPEAL AND ERROR—*Continued.*

ciple upon which an exception to the admission of evidence is untenable when such has theretofore been admitted without objection, has no application when the testimony excepted to is incompetent as an invasion of the province of the jury to ascertain a fact at issue as to the defendant's actionable negligence, and that formerly admitted relates to notice of defendant of the conditions existing at the time. *Marshall v. Telephone Co.*, 410.

23. *Appeal and Error — Trials — Damages -- Instructions — Agreement of Counsel—Attorney and Client.*—Where the plaintiff in his action seeks to recover damages of the defendant for injury to his land in ponding water upon it by the erection of a concrete and of a flash dam, and it appears to the Supreme Court, upon a return to a writ of *certiorari* ordered on a former hearing, that the plaintiff abandoned on the trial any claim for damages from the erection of the concrete dam, no error will be found in an instruction to the jury to that effect. *Ingram v. Power Co.*, 411.

24. *Appeal and Error—New Trial—Issues.*—In this case the Supreme Court refused, in its discretion, to confine the new trial to the only issue in which error was found. *Huffman v. Ingold*, 426.

25. *Appeal and Error—Briefs—Objections and Exceptions.*—Exceptions not considered in appellant's brief are taken as abandoned on appeal. *Shears v. Power Co.*, 447.

26. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—When it appears from the record of the case on appeal that the appellant excepted to the statement by the trial judge of his contention only, after verdict, it comes too late and will not be considered. *Ibid.*

27. *Appeal and Error—Judgments—Modification and Dismissal.*—Where a judgment has been properly entered against a party, except that it allows a greater amount for damages than found by the verdict, it may be modified in this respect on appeal and affirmed. *Clendenin v. Clendenin*, 466.

28. *Appeal and Error—Evidence—Verdict.*—Verdicts rendered solely upon conflicting evidence as to the facts will not be disturbed on appeal. *Spruill v. Bonner*, 480.

29. *Appeal and Error—Parties—Case Remanded.*—A case on appeal will be remanded to make additional parties, when they appear from the agreed case to be necessary for a proper determination of the controversy. *Brinson v. McCotter*, 482.

30. *Appeal and Error—Objections and Exceptions—Briefs.*—Appellant's exceptions of record, not brought forward in his brief, are deemed abandoned in the Supreme Court. Rule 34. *Hill v. Aman*, 483.

31. *Appeal and Error—Objections and Exceptions—Evidence.*—Exception to evidence should be specific when a part thereof is unobjectionable, and a general exception thereto cannot be sustained on appeal. *Holmes v. R. R.*, 497.

32. *Appeal and Error—Verdicts—Nonsuit—Peremptory Instructions—Evidence.*—Verdicts of juries are accepted as right on appeal unless some legal error has been committed by the trial judge sufficient to set

APPEAL AND ERROR—*Continued.*

them aside, and unless there is such, the action of the trial judge in refusing a motion to nonsuit, or its equivalent, a peremptory instruction upon the evidence, will not be disturbed on appeal. *Ibid.*

33. *Appeal and Error—Issues of Fact—Judgment—Technical Error.—Held,* only issues of fact were involved on this appeal, and the judgment as to amount of plaintiff's damages was not the basis of his appeal, being apparently according to his own agreement, and no error is found. *Ware v. Power Co.,* 500.

34. *Appeal and Error—Objections and Exceptions—Contentions.*—Objection to statement of the contention of a party by the trial judge to the jury must be taken at the time, or some request for other or more specific instructions, for an exception to be considered on appeal. *S. v. Reed,* 507.

35. *Appeal and Error—Instructions—Expressions of Opinion—Recollection of Evidence.*—The statement of the trial judge to the jury, in his instructions, of his recollection of the evidence cannot alone be held as the expression of his opinion thereon prohibited by statute. *Ibid.*

36. *Appeal and Error—Reference—Findings—Evidence.*—The findings of fact by the referee, approved by the trial judge, or different or additional findings by the judge, are not reviewable on appeal, when there is sufficient evidence to support them. *Steed v. Lumber Co.,* 508.

37. *Appeal and Error — Instructions — Verdict—Directing Evidence—Adverse Possession—Title.*—Where the title to the lands is in dispute in an action wherein claim and delivery for logs cut therefrom has been brought, and the defendant claims under an older paper title, and the plaintiff that he has been in adverse possession under a parol exchange of lands by the original owners for upward of thirty-three years, under metes and boundaries recognized by the defendant, and under a claim of right, and there is evidence to support this claim: *Held,* reversible error for the trial judge to direct a verdict in defendant's favor. *Moody v. Wike,* 509.

38. *Same—Estoppel.*—Where there is evidence tending to show that plaintiff had acquired title to lands by adverse possession that had been swapped by parol agreement between the original owners, the plea of estoppel is not required for him to avail himself of evidence thereof. *Ibid.*

39. *Appeal and Error—Instructions—Erroneous in Part.*—An ambiguous or incorrect portion of the charge to the jury will not be held for reversible error on appeal, when the charge, construed as a whole, and in its connected parts, correctly states the law controlling the case. *S. v. Robinson,* 516.

40. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* Exceptions to the rejection from the evidence of unanswered questions will not be considered on appeal when the answers thereto are not made to appear. *S. v. Caldwell,* 520.

41. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—An objection of a party to an action that the trial judge did not state his contentions with sufficient fullness to the jury, while

APPEAL AND ERROR—*Continued.*

the contentions of the other party were fully given, should be made in time to afford the judge an opportunity to supply any omission, or it will not be considered on appeal. *S. v. Hall*, 527.

42. *Appeal and Error—Criminal Law—Judgments—Sentence—Court's Discretion.*—Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed therein will not be reviewed by the Supreme Court on appeal where its exercise has not been grossly and palpably abused. *S. v. Jones*, 543.

43. *Appeal and Error—Criminal Law—Pleas—Judgment—Facts Admitted.* Where a defendant in a criminal action pleads guilty in the Superior Court, on his appeal from the judgment he cannot question the facts charged or the regularity or correctness of the proceedings, and there is nothing for review except whether the judgment is legal upon the facts admitted. *Ibid.*

44. *Appeal and Error—Brief—Exceptions Abandoned—Objections and Exceptions.*—Exceptions not brought forward in appellant's brief are taken as abandoned. Rule of Supreme Court 34. (174 N. C., 837.) *S. v. Pearson*, 588.

45. *Appeal and Error—Instructions—Contentions—Criminal Law.*—Exception to the statement made by the judge of the contention of a party is not ordinarily reviewable on appeal, especially if appellant has not excepted to the evidence upon which it was based. *Ibid.*

46. *Appeal and Error—Objections and Exceptions—Contentions of Parties.* Exceptions to the statement by the judge to the jury of appellant's contentions taken after the rendition of the judgment adversely to him and in his statement of the case on appeal does not afford the trial judge an opportunity to correct the error, if any, he has made therein, and they will not be considered in the Supreme Court on appeal. *S. v. Westmoreland*, 590.

47. *Appeal and Error — Objections and Exceptions — Instructions—Homicide.*—Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, C. S., 1634, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. *S. v. Harris*, 600.

48. *Appeal and Error—Record—Unnecessary Matter—Costs.*—Under the facts of this appeal from a conviction of murder in the first degree, the Supreme Court refused the motion of the prisoner's attorney to tax the State with the cost of printing alleged unnecessary matter. *Ibid.*

49. *Appeal and Error—Settlement of Case—Presumptions—Courts—Discretion.*—The trial judge, in settling the case on appeal, is conclusively presumed to have acted in the conscientious discharge of his duty, and the appellant may not successfully insist, in the Supreme Court, that upon the trial the counsel for appellee abused their privilege in their argument to the jury to his prejudice, when there

APPEAL AND ERROR—*Continued.*

is no such exception or assignment of error in the record sent up; and the Supreme Court has no power to compel the trial judge to amend the case settled by him. *Ibid.*

50. *Appeal and Error—Settlement of Case—Stenographer's Notes—Courts.* While the notes taken at the trial by the official stenographer are considered as of great weight in aiding the trial judge in settling the case on appeal, they do not control or displace his authority therein, and his statement thereof will control. *Ibid.*

51. *Appeal and Error—Objections and Exceptions—Assignments of Error.* Exceptions will not be considered in the Supreme Court on appeal that are not set out in the record as having been taken at the time, unless to the charge, and are duly assigned as error. *Ibid.*

APPORTIONMENT. See Statutes, 21.

APPORTIONMENT. See Statutes, 6.

ARBITRATION AND AWARD.

Arbitration and Award—Limit as to Time—Courts—Extension of Time.—Where, pending the action, the parties thereto, *ex curia*, enter into an agreement to arbitrate so as to conclude them all, and therein specifically state the time limit in which it was to be consummated, and that it was for the purpose of having a judgment signed by the judge at a certain term of the court upon the award entered, the court is without authority at the term stated, upon his finding that one of the selected arbitrators refused to serve, to order that the case be referred again to the same arbitrators to act under the agreement, fixing the term for final disposition, and refusing a motion of a party to place the case again on the trial docket. *Long v. Cromer*, 354.

ARGUMENT. See Courts, 17, 18.

ARMS. See Constitutional Law, 34.

ARREST. See Constitutional Law, 34.

ARREST OF JUDGMENT. See Indictment, 1.

ASSAULT. See Criminal Law, 10, 14, 15.

ATTACHMENT. See Courts, 1; Appeal and Error, 7; Process, 1.

ATTORNEY AND CLIENT. See Clerks of Court, 2; Appeal and Error, 23.

AUTOMOBILES. See Railroads, 3, 6, 7; Sales in Bulk, 4; Principal and Agent, 4; Negligence, 2; Taxation, 1; Employer and Employee, 1; Criminal Law, 3, 7; Intoxicating Liquors, 18; Criminal Negligence.

1. *Automobiles—Passengers—Negligence—Railroads—Crossings.*—Where a passenger has been injured while attempting to cross a railroad track in a collision with defendant's train, the negligence of the driver may not be imputed to her without showing that she had control over him, or was in some way responsible for his negligent act. *Parker v. R. R.*, 96.

AUTOMOBILES—*Continued.*

2. *Same—Contributory Negligence—Sudden Peril.*—The plaintiff, in her action to recover damages for personal injuries alleged to be caused by the negligence of the defendant railroad company while crossing its track as a passenger in an automobile, is not barred upon the issue of contributory negligence if it is shown that the defendant's negligence had placed her in sudden peril, and she, in acting upon the direction of defendant's employee, had been compelled to do so suddenly and in an emergency that did not permit deliberation. *Ibid.*

3. *Automobiles—Negligence—Passengers—Railroads.*—Where the plaintiff was a passenger in an automobile, and was injured by defendant's railroad train while the automobile was crossing the track, and the plaintiff had no control over the actions of the driver of the car, the only duty imposed on plaintiff was to look and listen and to warn the driver of the approaching danger. The charge of the court in this case is approved. *Ibid.*

4. *Automobiles — Passengers — Imputed Negligence — Evidence—Instructions.*—The principle applying that when two or more people riding in an automobile, on a joint enterprise, either for pleasure or on business, the one not driving is responsible for the contributory negligence, the proximate cause of the injury for which damages are sought in the action, must have supporting evidence in order to correctly give a requested instruction thereon. *Pusey v. R. R.*, 137.

5. *Same—Contributory Negligence—Negligence.*—Where the contributory negligence of one driving an automobile is sought to be attributable to another occupant in the car, who received an injury approximately caused by such negligence, the mere fact that they were taking a pleasure ride at the time does not alone create a joint enterprise, and the negligence of the driver of the car will not be imputed to the injured occupant unless such occupant was the owner of the car, or had some kind of control over the driver; the relation of host and guest alone being insufficient. *Ibid.*

6. *Same—Knowledge of Passenger.*—A prayer for instruction which places upon a guest in an automobile the duty to remonstrate with the driver thereof in order not to have the latter's contributory negligence imputed to him in his action to recover damages caused by a collision with a train, is erroneous where there is lack of evidence that the plaintiff was aware of or should have known of the circumstances tending to show the negligence of the driver of the automobile. *Ibid.*

7. *Automobiles — Statutes — Criminal Negligence — Evidence—Nonsuit—Questions for Jury.*—Evidence tending to show that the deceased was in a place of safety, many feet beyond the well-defined line of a public highway, and that without any apparent reason the defendant ran his automobile therefrom a considerable distance, with a clear and unobstructed view, and without turning aside to avoid the impact ran over and killed the deceased, is sufficient to take the case to the jury upon the question of the defendant's culpable negligence, and sustain a verdict of guilty of manslaughter under the provisions of C. S., 2618. *S. v. Rountree*, 535.

"AYE AND NO" VOTE. See Criminal Law, 22.

BENEFICIARIES. See Trusts, 2; Wills, 14.

BEQUESTS. See Wills, 4.

BETTERMENTS.

1. *Betterments—Evidence—Estates.*—When the unsuccessful defendant in an action of ejectment may recover as betterments for improving farm lands in which he had a life estate only, it is competent for him to show that the land had been depleted and remained idle for a period of time, and by his expenditures in a systematic plan of unusual fertilizing, clearing the lands of trees, ditching, building of fences, etc., with a *bona fide* and reasonable belief that he owned the fee, he had brought the land to a high state of cultivation; and it is for the jury to determine whether the land had been substantially and permanently improved thereby, and if so, the added value. C. S., 701. *Pritchard v. Williams*, 46.

2. *Same—Questions for Jury—Trials.*—Where it has been judicially determined, in an action of ejectment, that the defendant is entitled to recover for betterments placed thereon, while *bona fide* believing that he was the owner of the fee, when he was, in fact, a tenant for life, the wishes of the remainderman as to the kind or nature of the improvements, or whether they will be useful to him, is immaterial, the question for the jury to determine upon the evidence being the value of such improvements as were permanent and substantially increased the value of the land, not exceeding the cost. *Ibid.*

3. *Betterments—Estates—Tenants for Life—Deeds and Conveyances.*—One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. *Harriett v. Harriett*, 75.

4. *Same—Rents and Profits—Offsets—Statutes.*—When one holding under the tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant have received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. C. S., 700. *Ibid.*

BILLS AND NOTES. See Contracts, 14.

1. *Bills and Notes—Vendor and Purchaser—Sale and Return—Conditions.* Where the note given for the sale of a horse stipulates that it must work all right or the maker of the note could return it in seven days from its date, it is called a "contract for sale and return," passing title to the maker subject to the right under the conditions stipulated for, to return within the time fixed, and demand cancellation of the note; and upon his failure to do this the sale becomes absolute. *Fountain v. Jones*, 27.

2. *Same—Instructions—Burden of Proof—Appeal and Error.*—Upon the admission of the execution of the note sued on, "for the sale and return" of a horse within a specified time, upon certain conditions, the burden of proof is on the defendant to show such facts, in com-

BILLS AND NOTES—*Continued.*

pliance with the contract to return the horse in the time specified, as will avoid his obligation upon the note, and an instruction placing it upon the plaintiff is reversible error. *Ibid.*

3. *Same—Waiver—Agreements.*—Where there is evidence that the defendant offered to return a horse he had purchased from the plaintiff within the time stipulated in the note given for the purchase price, and thus avoid obligation thereon, but was twice persuaded by the plaintiff to give the horse other trials, the fact of such agreements would be a waiver of the return of the horse within the period specified in the note, and the second waiver prevents the plaintiff's objecting that the second offer to return the horse was not in a reasonable time, but thereafter the defendant could not use and keep the horse for six months without further tender of its return, if he had had reasonable opportunity to have done so. *Ibid.*

BILLS OF LADING. See Carriers of Freight, 4.

BILLS OF PEACE. See Appeal and Error, 14.

BLOODHOUNDS. See Evidence, 17.

BOARD OF EDUCATION. See Trusts, 4.

BOARD OF TRADE. See Warehousemen, 4.

BONDS. See Constitutional Law, 9, 12, 13, 14, 19, 28; Municipal Corporations, 5.

BREACH. See Vendor and Purchaser, 2; Deeds and Conveyances, 27.

BRIDGES. See Constitutional Law, 19, 21; Statutes, 6.

BRIEFS. See Appeal and Error, 25, 30, 44.

BURDEN OF PROOF. See Bills and Notes, 2; Evidence, 3, 4; Negligence, 1; Intoxicating Liquors, 3, 11; Criminal Law, 19.

CANALS. See Drainage Districts, 2.

CANCELLATION. See Actions, 1; Deeds and Conveyances, 10.

CARRIERS. See Railroads, 10; Principal and Agent, 6, 8.

CARRIERS OF GOODS. See Carriers of Freight.

CARRIERS OF PASSENGERS. See Street Railways, 1.

CARRIERS OF FREIGHT.

1. *Carriers of Freight — Railroads — Commerce — Contracts—Receipts—Stipulations—Written Demand—Federal Statute.*—The usual stipulations in the bill of lading or contract of carriage, requiring written notice to the common carrier for damages as a condition precedent, and upheld as conditions on the right of recovery, and not exemptions from liability for its negligent acts or torts, are changed as they affect interstate commerce by the Cummins' Amendment to the Interstate Commerce Act. *Moore v. Express Co.*, 300.

CARRIERS OF FREIGHT—*Continued.*

2. *Same—Cummins' Amendment—Reasonable Time.*—Under the Cummins' Amendment to the Interstate Commerce Act, a written demand upon the common carrier for damage caused by its failure to deliver an interstate shipment is to be made within a reasonable time from the date of shipment, which depends upon the facts and circumstances of each particular case. *Ibid.*

3. *Same—War—Evidence.*—In order to show that a written demand for damages had been made within a reasonable time on a common carrier failing to make delivery of an interstate shipment, it is competent for the plaintiff in the action to show that all shipments were then delayed owing to a state of war and the Government's control and pressing need of the carrier's service, and also an epidemic which then affected transportation. *Ibid.*

4. *Carriers of Freight—Negligence—Misrouting—Damages—Notice—Bills of Lading—Railroads.*—Upon the principle relating to the carrier's negligence announced in the former appeal in this case (179 N. C., 540), evidence of the rental value of the printer's outfit and other parts connected with it was competent upon the measure of the consignor's damages under the notice given to the initial carrier of its intended use, though not set out in the bill of lading or written contract of carriage, and which resulted from the wrongful misrouting and reshipment by the carrier. *Harrell v. R. R.*, 315.

5. *Same—Refusal of Possession—Reshipment.*—Where a reshipment of goods is made necessary by the carrier's error in routing it, the carrier may not wrongfully impose a condition to its delivery upon the shipper, and avoid the payment of further damages caused by its making the reshipment itself. *Ibid.*

6. *Carriers of Freight—Acceptance—Damages.*—No liability attaches to the common carrier for damages to or loss or destruction of goods until its acceptance thereof is legally established. The distinction is observed when a penalty is sought for failure to make shipment. *Brown v. Payne;* 381.

7. *Same—Evidence—Instructions—Verdict Directing—Custom.*—Where the custom at the carrier's station is relied on to prove its acceptance of a carload of lumber placed on its right of way for shipment, testimony of the plaintiff's agent that in accordance therewith the local agent of the carrier told him he would get a car for it as soon as he could, and the lumber was placed where the carrier's agent told him, who then accepted it, saying he would get at it as soon as he could, and this was before the occurrence of a fire destroying the property, causing the damages in suit: *Held*, the acceptance of the order for a car and the acceptance of the goods are two different things, and an instruction to the jury if they believed the evidence to answer the issue in the affirmative is reversible error, the determination thereof being for the jury, under a proper instruction. *Ibid.*

8. *Carriers of Freight—Express Companies—Injury to Stock—Negligence—Presumption—Evidence—Questions for Jury—Trials.*—Under a contract of shipment with the carrier, an express company, the consignor was furnished with free transportation under an agreement that he would go in the same car with and care for his stock to a

CARRIERS OF FREIGHT—*Continued.*

certain place en route, which he did, but there took a different train to destination: *Held,* the presumption of negligence on the part of the express company arising from delivery of some of the stock injured while being transported is not rebutted by the fact of free transportation of the consignor under the terms of the contract; and evidence that before reaching the intermediate point an animal was injured in his foot by a nail in the car, and thereafter another died from an injury to its back, is sufficient to take the case to the jury. *Barden v. Express Co.,* 483.

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers — Railroads—Passengers—Evidence—Questions for Jury—Trials.*—Evidence that the plaintiff went to the defendant railroad company's passenger depot for the purpose of becoming a passenger on the defendant's next train, about an hour before schedule time, then open for the reception of passengers, and waited for the opening of the ticket office, which was customarily done a quarter of an hour before train time, is sufficient for the jury to find that during this time the relation of carrier and passenger existed between the parties. *Clark v. Bland,* 111.

2. *Same—Reasonable Time.* -Where a person goes to the passenger depot of a railroad company, open for his reception, for the purpose of taking a train, before the customary time for the ticket office to open, the custom as to the time of defendant to open its ticket office is not controlling on the question whether the person has entered the station "within a reasonable time before the departure of his train," but it may be considered with the other evidence tending to show he had done so. *Ibid.*

3. *Carriers of Passengers—Railroads—Duty to Passengers—Protection.*—A railroad company is held to a high degree of care in protecting its passengers from violence and insult, and may be held liable for injuries inflicted in breach of this duty on the part of their employees, and of others also which it could have prevented in the reasonable and proper performance of this duty. *Ibid.*

4. *Same—Principal and Agent—Punitive Damages.*—Where, in breach of the duty of a railroad company to protect its passengers, injuries are inflicted on the passenger by the company's employees willfully and of malice, or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury. *Ibid.*

5. *Same — Liability of Carrier—Agency—Evidence—Trials.*—Where railroad agents are to be changed at a station, and the one leaving has remained to help or instruct the other in his duties there, he may properly be considered the agent of the railroad company for that time, whose failure to discharge the carrier's duty to protect its passengers will subject the carrier to the payment of actual damages, and under proper circumstances, of punitive damages, to be awarded in the discretion of the jury. *Ibid.*

6. *Carriers of Passengers — Railroads — Relation of Passenger—Depot Premises—Assault—Principal and Agent.*—In order to come within the duty of a railroad company to protect one in the relation of a passenger, it is not always required that the person should remain

CARRIERS OF PASSENGERS—*Continued.*

continuously in the carrier's coach or on the carrier's immediate premises, and evidence that the local agent of the railroad called a passenger off its premises ostensibly for another purpose, but in fact for the purpose of an assault, without the passenger's knowledge of this purpose, and then assaulted and injured him, just beyond the depot premises, is sufficient to take the case to the jury upon the question of the relationship of the injured person to the carrier as a passenger. *Ibid.*

7. *Carriers of Passengers—Alighting from Train—Proper Assistance—Negligence—Damages—Insult—Punitive Damages.*—Passengers alighting from a train at a station are entitled to reasonable and proper assistance, and when the conductor has been made aware of a physical infirmity of a very old woman, and that her condition required a step-box or an ordinary box from the lower step to the ground, which he could readily and easily have furnished, but insultingly refused to do so, the company is not only responsible in actual damages for the injury proximately caused, but in punitive damages to be awarded in the discretion of the jury. *Holmes v. R. R.*, 497.

CASE. See Appeal and Error, 9, 10, 11, 12, 17, 18, 20, 29, 49, 50.

CASE AGREED. See Deeds and Conveyances, 10; Constitutional Law, 35.

CAUSA MORTIS. See Gifts, 1, 5, 6.

CERTIFICATES OF DEPOSIT. See Wills, 1.

CERTIORARI. See Appeal and Error, 17.

CHARITABLE USES. See Trusts, 1, 3, 4.

CHILDREN. See Estates, 5; Wills, 10, 15, 18; Courts, 25.

CITIES AND TOWNS. See Municipal Corporations; Evidence 5; Taxation, 1; Constitutional Law, 25.

CLERKS OF COURT.

1. *Clerks of Court—Deeds and Conveyances—Fiat—Statutes.*—The statutory provision for the fiat of the clerk of the Superior Court for the registration of a deed to lands is directory and not mandatory, and its omission will not invalidate the instrument if it is shown that it had been registered after proper probate. *Sluder v. Lumber Co.*, 69.

2. *Clerks of Court—Attorney and Client—Infant Parties—Counsel Fees—Allowances—Procedure.*—The Superior Court judge cannot fix the compensation of the attorney for an infant party to the action and declare it a lien upon the lands in controversy, the procedure therefor being before the clerk, where the infant may be represented by a guardian, and the amount fixed subject to the approval of the proper tribunal in passing upon his accounts. *Roe v. Journigan*, 180.

CLOUD ON TITLE. See Actions, 1.

COLOR. See Deeds and Conveyances, 13, 15, 16; Equity, 1; Limitation of Actions, 3, 7.

COMMERCE. See Carriers of Freight, 1; Railroads, 14.

COMMISSIONS. See Statutes, 2.

COMMON LAW. See Taxation, 2.

COMMUNICATIONS. See Homicide, 4.

COMPROMISE. See Jury, 2.

Compromise—Acceptance of Check, in Full—Accord and Satisfaction—Debtor and Creditor.—A creditor who accepts and cashes a check whereon is written that it is a settlement in full, being for a disputed account, may not, without having first made a valid agreement to the contrary, repudiate the conditions upon which he was to have accepted it; and this principle applies when his own account for goods sold and delivered is not disputed, but a deduction is claimed by the sender of the check for damages he claims in a different matter. *Supply Co. v. Watt*, 432.

CONDITIONS. See Bills and Notes, 1; Deeds and Conveyances, 24; Gifts, 9; Wills, 16; Insurance, Life, 5.

CONDITIONS PRECEDENT. See Contracts, 14.

CONFLICT OF LAWS. See Intoxicating Liquors, 14.

CONSIDERATION. See Contracts, 1, 21; Deeds and Conveyances, 19, 28.

CONSIGNOR AND CONSIGNEE. See Principal and Agent, 6, 8.

CONSPIRACY. See Criminal Law, 13.

CONSOLIDATED STATUTES. See Statutes, 10.

CONSOLIDATED STATUTES.

SEC.

408. Under the facts of the case, the coverture of the wife will not avail her to repel the bar of the statute of limitations. *Butler v. Bell*, 85.

476, 505, 509. These provisions do not apply to county court of Forsyth, where terms of court occur monthly or oftener. *Guano Co. v. Supply Co.*, 210.

507, 516. Causes of action under first section may not be united except foreclosure of mortgage, unless all parties are affected, or severed under last section where there is misjoinder of parties and causes. *Roberts v. Mfg. Co.*, 204.

519, 521, 602. Where Superior Court has jurisdiction of an equity or amount involved, counterclaim may be set up, though falling within the original jurisdiction of justice's court. *Sewing Machine Co. v. Burgess*, 241.

543. An instruction that plaintiff, in action for libel, must satisfy the jury of the amount of damages, held not error, under the facts of this case. *Paul v. Auction Co.*, 1.

564. Remarks made in pleasantry by the judge, which must have been so understood by the jury, are not prejudicial error as an expression of his opinion. *S. v. Jones*, 546.

CONSOLIDATED STATUTES—*Continued.*

SEC.

600. Judgment by default for want of an answer will not be set aside when regularly entered after notice. *Guano Co. v. Supply Co.*, 210.

700. Under the facts of this case, the remaindermen are not entitled to offset rents and profits against the value of betterments accruing to one holding under the life tenant, reasonably believing himself to hold title in fee. *Harriett v. Harriett*, 75.

701. Betterments may be claimed for permanently improving a depleted body of land and systematically bringing it to a high state of cultivation. *Pritchard v. Williams*, 46.

991. The word "heirs" is not necessary to pass a fee in land under a will, when the intent of the testator is properly construed to pass the fee. *Whitchard v. Whitehurst*, 79.

991. The court, in its equitable jurisdiction, may correct an instrument so as to pass a fee in land when the intent so appears, in the submission of a case agreed. *Ibid.*

1013. A valid statute. Its violation *prima facie* evidence of fraud. Goods subject to levy when identified in hands of purchaser or value recovered, though such purchasers are not dealers. *Rubber Co. v. Morris*, 184.

1412. Where plaintiff's equity has been established on appeal, all parties are before the court, and the same equity involved on defendant's appeal, the Supreme Court may enjoin, as in the nature of a bill of peace, various actions pending. *Mining Co. v. Mills Co.*, 361.

1473. Justice's court has original jurisdiction of actions on contract to recover money not in excess of $200. *Sewing Machine Co. v. Berger*, 241.

1474. Superior and justices' courts have concurrent jurisdiction over value of personal property to $50, and the former is exclusive in excess of that sum. *Ibid.*

1500. (Rule 12.) Superior Court may liberally allow amendments to criminal complaint, on appeal, without change of the character of offense originally charged. *S. v. Mills*, 530.

1617. Action for divorce returnable in county where either party resides. *Wood v. Wood*, 227.

1634. Failure of wife to testify for husband charged with a criminal offense must not be taken to his prejudice; its admission under the action immediately taken by trial judge renders it harmless. *S. v. Harris*, 600.

1651. A devise in fee upon contingency of the death of another is a descendible interest. *Hines v. Reynolds*, 343.

2142. Action may be maintained against endorser on negotiable instrument independent of its original infirmity as a gambling obligation. *Bank v. Crafton*, 404.

2429. As to whether *retraxit* or apology applies to individuals not connected with newspapers, as to libel, *quere*. *Paul v. Auction Co.*, 1.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2500, 2503. Under conflicting evidence, question as to reasonableness of register of deeds before issuing marriage license is one for jury. *Lemmons v. Sigman*, 238.

2587. Contract for sale of personalty, retaining title, comes under the provisions of this section. *House v. Parker*, 40.

2591. Under the facts of this case it became immaterial that bid for land at mortgage sale was not kept open for ten days. *Wise v. Short*, 320.

2618. Reckless driving of an automobile incompatible with proper regard to human life is sufficient for conviction under the evidence in this case. *S. v. Rountree*, 535.

2618. Statutes fixing speed limits within and without cities, etc., and its excess a misdemeanor, does not necessarily preclude a conviction for reckless driving within those limits. Under facts of this case, jurisdiction is in magistrate's court. *S. v. Mills*, 530.

2807. This section sets at rest the question as to the common-law principle whether cities are liable for failure to supply sufficient water to extinguish fires. *Mack v. Charlotte*, 383.

2818 *et seq.* These sections limit the rate of taxation of cities and towns to 10 per cent increase of taxes over 1919, and prohibits them from increasing more than 10 per cent on the average assessed value of property for next three years. *Allen v. Raleigh*, 453.

2825. Admission in evidence of a town ordinance regulating the speed of backing railroad trains, not error when it appears the defendant's negligence proximately caused the injury. *Parker v. R. R.*, 195.

3047. Endorsement on promissory note is an independent contract. *Bank v. Crafton*, 404.

3304. The innocent owner of an automobile does not forfeit it upon conviction of another of using it for sale of spirituous liquor; the principles of principal and agent does not apply under the facts of this case; and such owner may reclaim his property upon interpleader. *S. v. Johnson*, 638.

3309. Notice of adverse claim under 99-year lease of lands is from registration. Possession not sufficient. *Dye v. Morrison*, 309.

3369. Where the State has satisfied the jury beyond a reasonable doubt that defendant was selling or offering for sale liquid containing alcohol sufficient to make men drunk he must be convicted, unless he satisfies the jury he was selling flavoring extracts coming within the terms of the exception. Secs. 3373, 3375.

3373, 3375. By express provision of the statute, "flavoring extracts when sold as such" are excluded from the general provisions of the prohibition law, and the defendant indicted for its violation may show by parol evidence that his conduct came within the exception, though his "extracts" contained alcohol sufficient to make men drunk. This does not conflict with the Volstead Act. *S. v. Barksdale*, 622.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3385, 3386, 3379. The unlawful purpose of sale of spirituous liquors is the offense created, possession *prima facie* evidence of the unlawful purpose, and does not establish *prima facie* case of guilt, or place burden on defendant. *S. v. Holmes*, 566.

3618, 3619. Advice and intent to take a drug to destroy unborn child is sufficient to sustain an indictment. *S. v. Powell*, 515.

3908, 3909. (Rev., 2777.) Sheriff's fees for seizure and destruction of illicit stills, excluded by public-local law putting sheriff upon salary. *Thompson v. Comrs.*, 265.

3943. Statute strictly construed. "Escape" not shown under facts of this case, and sheriff not liable for penalty. *Brady v. Hughes*, 234.

4200. The killing of a human being to perpetrate or attempt to perpetrate a robbery is competent evidence to be considered by the jury in determining the degree of the crime. *S. v. Westmoreland*, 500.

4215. The restriction of punishment when no deadly weapon is used in an assault, except upon a female by male over eighteen years, is not unconstitutional as a severe sentence, or a denial of equal protection of the law, or an imposition of a cruel and unusual punishment. *S. v. Stokes*, 539.

4226. Evidence of advice to one pregnant to take a drug to destroy unborn child, sufficient for conviction. *S. v. Powell*, 515.

4447. The statute of two years runs from the second abandonment of the wife as a new offense. When the husband has moved to another State, the indictment lies here, the place of her residence; a conviction is equivalent to a finding of abandonment without justification; both the fact of willful abandonment and failure to support must be proved. *S. v. Beam*, 597.

4506. The punishment for intoxicated persons driving automobile on a public highway, restricted to a minimum as to fine or imprisonment leaves it to the court's discretion; jurisdiction of magistrate to bind over; not a cruel or unusual punishment as a mere matter of law or appeal to Supreme Court. *S. v. Jones*, 543.

4610. Defendant charged with misdemeanor, may waive bill of indictment and jury's action thereon, by plea of not guilty. *S. v. Jones*, 543.

4622. Verdict of guilty on several accounts will sustain judgments for the separate offenses. *S. v. Mills*, 530.

4647. Superior Court on appeal may allow amendment to complaint or warrant to make one complaint include the several offenses under different counts. *S. v. Mills*, 530.

4690 *et seq.* Contracts for sale of fertilizer, specifying only as to analysis of State Agricultural Department, excludes parol evidence by loss of value to crops, or as to injurious ingredient not found by such analysis. *Fertilizer Co. v. Thomas*, 274.

5039. Justices of the peace have no jurisdiction to bind over for misdemeanors and felonies wherein jurisdiction is given the juvenile

CONSOLIDATED STATUTES—*Continued.*

SEC.

courts; and where the jurisdiction has attached it will continue though the age of the minor has since exceeded the prescribed age. *S. v. Coble.*

5041. This section cures the discrepancy as to the jurisdictional age of the child in ch. 97, sec. 3, Laws 1919. *S. v. Coble*, 554.

5272, 5273, 5274, 5280, *et seq.* Under these sections the respective obligations and burdens upon the lands of the various owners of land in drainage districts are ascertained and apportioned. *Craft v. Lumber Co.*, 29.

5284. Upon the hearing of landowners, it may be shown that by eliminating those who desired to withdraw, the number of petitioners for drainage district was insufficient. *Armstrong v. Beaman*, 11.

5374, 5375. Special or local laws, relating to drainage districts, complete in themselves, are not repealed by C. S. making the failure of commissioners to file certain reports an indictable offense. *S. v. Gettys*, 580.

7776-7786. Lien for license tax superior to that of chattel mortgage. *Brunswick-Balke Co. v. Mecklenburg*, 386.

7919. A written protest and demand on county treasurer in 30 days is necessary to maintain action, after 90 days, for recovering a license tax in action against county, for both State and county tax. *Ibid.*

8106. Special provisions as to county court for filing pleadings not repealed by this section. *Guano Co. v. Supply Co.*, 210.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 24. The right given the people to keep and bear arms, includes pistols. *S. v. Kerner*, 574.

II, sec. 14. These provisions are mandatory, requiring journals to show "Aye" and "No" vote; and an amendment made after passage requires the compliment with the Constitution as to the whole matter. *Allen v. Raleigh*, 454.

II, sec. 29. Public-local act incorporating road commissioners with powers of county commissioners as to the roads within the territory is constitutional; and authority to issue bonds is not a prohibited or local act, when there is no provision as to laying out highways, etc. *Comrs. v. Bank*, 347.

II, sec. 29. Statute laying of school district and providing for bonds is a prohibited local or special act by general law, and bonds invalid when the act itself is so. *Trustees v. Trust Co.*, 306.

III, sec. 29. State may delegate authority to county to pay proportion of expenses in building bridge over stream on State lines. *Emery v. Comrs.*, 420.

IV, sec. 13. Statute authorizing waiver of indictment bound over from an inferior court is constitutional. *S. v. Jones*, 543.

CONSTITUTION OF NORTH CAROLINA—*Continued.*

ART.

IV, sec. 33. Amended as to the jurisdiction of justice's court by Convention of 1875, by eliminating the words "exclusive, original." *Sewing Machine Co. v. Burger*, 241.

VII, sec. 7. Statute is valid authorizing county to pay proportion of cost of bridge over stream on State line, and objection that the county will pay more than its part is untenable. *Emery v. Comrs.*, 420.

VII, sec. 7. In order for a county to change its county-seat and thus incur a debt, it must be approved by a majority of its qualified electors; and a majority of those voting is insufficient. *Long v. Comrs.*, 146.

VIII, sec. 1. The Legislature may not deprive a turnpike company of a part of its profits acquired in the use of the road by changing the location of a toll gate; and this is especially true when the statute was passed since the recent constitutional amendments, relating to private, etc., acts. *Watts v. Turnpike Co.*, 129.

VIII, secs. 1, 2, 3, 4. The legislative present powers to authorize bonds issued by municipalities apply only when such have a valid existence. *Trustees v. Trust Co.*, 306.

CONSTITUTION. See Courts, 13.

CONSTITUTIONAL LAW. See Removal of Causes, 4, 5; Elections, 2; Courts, 7; Municipal Corporations, 9; Criminal Law, 6; Intoxicating Liquors, 1, 20; Criminal Law, 9.

1. *Constitutional Law—Statutes—Wills—Defective Probate.*—An act of the Legislature which cures previous defects in the probate of a will, and not in its execution, does not impair vested rights of the heirs at law of the grantor, and is constitutional. *Sluder v. Lumber Co.*, 69.

2. *Constitutional Law — Statutes — Private Acts—Corporations—Amendments — Turnpikes — Roads and Highways — Counties — Leases.*—A turnpike company having powers under its charter, and also under a special act of the Legislature, acquired from the county commissioners a lease for fifty years to a certain length of a public road, to be used as a part of its turnpike road, with the right to place one or more toll gates thereon, before the recent adoption of the amendments to our State Constitution, and improved the same by the expenditure of large sums of money: *Held*, an act of the Legislature, passed since the adoption of the constitutional amendment, that prohibited the turnpike corporation from continuing the existence of a toll gate at or near a certain terminus of its road, necessary to the full enjoyment of the returns therefrom, and permitting a part thereof to be used toll free, is invalid under Art. VIII, sec. 1 of the Constitution as amended, which requires that the General Assembly shall provide by general laws for amending, etc., charters of all corporations, expressly stating turnpike companies, and excluding them from the exceptions to the general law. *Watts v. Turnpike Co.*, 129.

3. *Same—Vested Rights.*—The recent amendment to our Constitution, by substituting a new section for Art. VIII, sec. 1, prohibiting the Legislature, with certain exceptions, from creating or amending the

CONSTITUTIONAL LAW—*Continued.*

charters of corporations, by special act, but requiring this to be done under a general law, renders invalid a later special act of the Legislature, attempting to amend the charter of a turnpike corporation, affecting rights theretofore acquired, and also acquired under special statutes, enacted before the adoption of the constitutional amendments. *Ibid.*

4. *Same—Tolls.*—Where a turnpike corporation has acquired certain rights under statue authorizing a lease of a public road from a county, and has expended thereunder for improvements thereon large sums of money, a subsequent amendatory act which, by restricting the placing of a toll gate at a certain place, deprives the company of its right to collect a substantial part of its revenue from the road, impairs and destroys a vested property right, and is unconstitutional and invalid. *Ibid.*

5. *Same—Eminent Domain.*—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public, or other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. *Ibid.*

6. *Same—Regulation of Tolls.*—Where a turnpike company has dedicated its property to a public use, the principles applying to *quasi*-public corporations in relation to the regulation of rates of tolls through properly constituted agencies generally apply. *Ibid.*

7. *Constitutional Law—Statutes—Counties—"Faith and Credit"—Electors.* The words used in our Constitution requiring "a majority of the qualified voters of the county" to pledge its credit, except for necessary expenses, have a well known meaning in the law, and accordingly a mere majority of the votes cast at the election is insufficient if not also a majority of the qualified electors of the county, whether they voted or not. *Long v. Comrs.*, 146.

8. *Constitutional Law — Amendments — Statutes — Public-Local Laws — School Districts.*—A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the recent amendment to our Constitution forbidding the General Assembly from enacting any local or special acts to establish or change the lines of school districts making them void, and requiring legislation of this character by general provisions of law. Constitution, Art. II, sec. 29. *Trustees v. Trust Co.*, 306.

9. *Same—Taxation—Bond Issues—Municipalities.*—The principle that, under the recent amendments to our Constitution, the Legislature may authorize counties and cities, etc., to issue bonds to provide necessary revenue for their proper governmental purposes, refers only to such as come under the amendments to Art. VIII, secs. 1, 2, 3, 4, of our Constitution, or such as have a valid existence, and not to school districts sought to be established under an act prohibited by our present Constitution, Art. II, sec. 29. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

10. *Same—Acts Dependent on Unconstitutional Statutes.*—Where the establishing of a school district is under an act prohibited by Art. II, sec. 29, of our present Constitution, as a local or special act, the issuance of bonds permitted by the same or similar statute for the revenue necessarily required for the purposes of the invalid act, is dependent upon that act, and falls with it as an unconstitutional measure. *Ibid.*

11. *Constitutional Law—Statutes—Local Law—Road Districts—Counties.* A public-local act incorporating road commissioners of a county, and giving them the powers, rights, duty, and authority, as to the highways of that county, etc., that were formerly held by the county commissioners, does not contravene sec. 29, Art. II, of the State Constitution, in depriving the board of county commissioners of certain powers relating to the public roads therein. *Comrs. v. Bank*, 347.

12. *Same—Bonds.*—An act of the Legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering, or discontinuing any road or highway, does not contravene Art. II, sec. 29, of our State Constitution, prohibiting the Legislature from passing local, private, or special act relating to the subject. *Ibid.*

13. *Same—Limitation of Issuance of Bonds in Series.*—Municipal or district bonds for road purposes may be issued in the judgment of the proper authorities as and when needed, when the statute under which they are issued impose no limitation thereon, except as to the total amount, by requiring that it should not exceed a certain per cent of the assessed property valuation of the district. *Ibid.*

14. *Same—Notice to Purchasers of Bonds.*—Where the proper authorities are given, under the statute, discretion to issue road bonds for a district as and when needed, not exceeding an amount to be ascertained according to a percentage of the assessed property valuation of the district, a provision in the order for issuing the bonds, that it was the first to be made, is notice that other bonds under the same power would thereafter be issued. *Ibid.*

15. *Constitutional Law—Road Districts—Counties—Municipal Corporations—Statutes—Amendments to Statutes—Elections.*—An amendment to a former act authorizing a road district to issue bonds for road purposes upon the approval of the electors, which imposes additional expenditures and reduces the amount of the bonds to be issued, and is silent as to another election on the question, restores the authority of the former act and the purchasers of the bonds may not successfully maintain that another election is essential to the validity of the bonds. *Ibid.*

16. *Same—Necessary Expenses.*—The expenditure of moneys by a road district for its roads is for necessary purposes, and where bonds are authorized by statute to be issued with the approval of the electors of the district, an amendment to the act, which is silent upon the question of holding another election, cannot be construed to require it. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

17. *Constitutional Law—Statutes—Taxation—Statutes Valid in Part.*—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. *Brunswick-Balke Co. v. Mecklenburg*, 386.

18. *Constitutional Law—Taxation—Licenses—Police Powers—Discrimination—Counties—Discretion.*—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. *Ibid.*

19. *Constitutional Law—Counties—Streams—Bridges—Statutes—Bonds—State Lines—Apportionment of Expenses—Necessary Expenses.*—Our statutes are constitutional and valid, authorizing the county commissioners of any county bordering on another State to pay the proportion of the cost of building any bridge spanning a river where it is the State line, including cost of approaches, and to issue bonds to raise money to pay the same; and the objection that the building of the bridge is not a necessary county expense, and may require the county to pay more than it should for that part of the bridge and approaches that lie within the county, is untenable. Const., Art. VII, sec. 7. *Martin Co. v. Trust Co.*, 178 N. C., 26, cited and applied. *Emery v. Comrs.*, 420.

20. *Same—Population.*—Where a county is authorized by statute to unite in building a bridge over a stream on the State line with another county lying across the stream, in another State, the proportionate cost should be adjusted with a view to the proportionate benefits received by it, which is *prima facie* in proportion to population, unless the statute authorizes an agreement upon a different basis. *Ibid*

21. *Constitutional Law—Statutes—State Lines—Streams—Bridges—Delegated Powers—Counties.*—The authority that a Legislature of this State has to unite with an adjoining State in constructing and maintaining a bridge over a stream on a State line, may be delegated by a general statute to the commissioners of any county lying on the stream, to take proper action, bear the cost, and adjust its contribution with the authorities of the county lying on the other side of the stream. Const., Art. III, sec. 29. *Ibid.*

22. *Constitutional Law—Taxation—Statutes—"Aye" and "No" Vote—Journals.*—The provisions of Art. II, sec. 14, of the State's Constitution

CONSTITUTIONAL LAW—*Continued.*

requiring, among other things, that the "Yea" and "Nay" vote shall be entered on the journal, in order for the people of the State, cities, or towns therein to pledge their faith or credit, etc., are mandatory, and the journals of each house, respectively, afford the only competent and sufficient evidence as to the procedure in a given case, and unless it affirmatively appears from these journals that the constitutional requirements have been complied with, the statute, in so far as it affects the specified measures, must be held invalid. *Allen v. Raleigh,* 453.

23. *Same—Amendments.*—Where a bill has passed both branches of Legislature, complying with our State Constitution, Art. II, sec. 14, as to the pledging of credit by the State, counties, cities, and towns, a motion to reconsider may be had by a *viva voce* vote; and its effect is to abrogate the vote passed on the question and to again bring it forward to be discussed and decided in the same manner as it was originally for the consideration and determination of the General Assembly; and for the act to be valid the final result must have complied with the constitutional requirements as to its reading on the several days, the taking of the "Aye" and "Nay" vote, and their proper entry upon the respective journals. *Ibid.*

24. *Same—Repealing Clauses of Invalid Statutes.*—Where a statute enacted to afford the means to carry on the purposes of well ordered government in respect to debt and taxation has been declared unconstitutional and invalid, it will not be held that it was in the legislative contemplation that if these provisions failed the local governments be left without any powers in these necessary matters; nor will this result be affected by a repealing clause in the invalid statute, which contemplates that the new act would take the place of the former one that it purports to repeal; for in such instances the repealing clause falls with the invalid act, of which it is a part. *Ibid.*

25. *Constitutional Law—Municipalities—Cities and Towns—Taxation.*—*Held*, the Municipal Finance Act of 1921, with its repealing clause, being unconstitutional and invalid as to contracting debts and levying taxes, the laws now in force and effective on these subjects are Consolidated Statutes, secs. 2818 to 2867, inclusive; and under these laws counties, cities, and towns and taxing districts are restricted from levying a tax rate that will realize an amount greater than 10 per cent in excess of the tax collected by them for the year 1919, and prohibited from further increasing their net municipal indebtedness by an amount greater than 10 per cent on the average assessed value of the property for the next preceding three years. *Ibid.*

26. *Same—Injunction.*—The present proposed tax, to be levied by the defendant in this case, being an increase of its indebtedness in excess of the limit now imposed on cities, etc., by statute, its collection must be declared invalid, and further procedure to collect the same permanently enjoined. *Ibid.*

27. *Constitutional Law—Amendments—School Districts—Private and Local Laws.*—An act automatically creating a school district coterminous with the lines of a certain township in a county, if the voters should by their ballot approve of bonds to be issued and taxes levied for the maintenance, etc., of the district for certain purposes named in the

CONSTITUTIONAL LAW—*Continued.*

act, is invalid under the recent amendments adopted to our Constitution (Art. II, sec. 29), prohibiting the General Assembly from passing any local, private, or special act or resolution relating to the establishing, etc., lines of school districts. *Fairmont Graded School District v. Mutual Loan and Trust Co., ante,* 306, cited, approved, and applied. *Sechrist v. Comrs.,* 511.

28. *Constitutional Law—School Districts—Bonds—Taxation.*—Where an act to create a public school district is unconstitutional, Art. II, sec. 29, the taxation and provision for bonds for the purpose of the act are likewise void. *Ibid.*

29. *Constitutional Law—Validating Statutes—Voidable Statutes—Void Statutes.*—The Legislature may validate voidable prior acts, but not those which are absolutely void as being without constitutional authority. *Ibid.*

30. *Constitutional Law—Criminal Law—Assaults—Female—Discrimination.* C. S., 4215, making conviction in cases of assault without intent to kill or injure punishable by fine or imprisonment, in the discretion of the court, restricting the punishment when no deadly weapon has been used or serious damage done, to a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, but excluding from this restriction, among other things, an assault by any man or boy over eighteen years old, on any female person, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution. *S. v. Stokes,* 539.

31. *Constitutional Law—Criminal Law—Statutes—Affirmative Terms—Court's Discretion—Punishments.*—C. S., 4215, is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intent to kill, the person convicted shall be punished by fine or imprisonment, in the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc. *Ibid.*

32. *Constitutional Law—Cruel and Unusual Punishments—Legislative Powers—Court's Discretion.*—The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, C. S., 4215, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. *Ibid.*

33. *Constitutional Law—Statutes—Criminal Law—Indictment—Waiver.*—C. S., 4610, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. Constitution, Art. IV, sec. 13. *S. v. Jones,* 543.

34. *Constitutional Law—Criminal Law—Statutes—Weapons—Arms—Unconcealed Weapons.*—A statute making the carrying of a weapon, specifying pistols, among other things, from the premises unconcealed, a misdemeanor and punishable the same as if carried concealed, unless a permit be first obtained upon a statement of the purpose for which

CONSTITUTIONAL LAW—*Continued.*

it was to be carried, the payment of a $5 license fee and the giving of a $500 bond, exceeds the legislative power of police regulation and is in violation of the declaration of rights in our State Constitution, that "The right of the people to keep and bear arms shall not be infringed," with proviso that "nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting statutes against said practice." Const., Art. I, sec. 24. *Semble,* a pistol is included in the word "arms" *ex vi termini. S. v. Kerner,* 574.

35. *Same—Questions of Law—Trials—Case Agreed.*—Where it appears from a special verdict that the defendant was tried for carrying an unconcealed weapon, made a misdemeanor under a public-local statute; that he had been accosted on the street of a town by one who desired to bring about a fight, and that the defendant then put down some packages he was carrying and went to his store and returned with a pistol, carrying it openly: *Held,* the offense created by the statute was unconstitutional, and a conviction thereunder could not be sustained, as a matter of law. *Ibid.*

CONTENTIONS. See Instructions, 3; Appeal and Error, 11, 26, 34, 41, 45, 46.

CONTINGENCY. See Wills, 1, 13, 15, 18; Descent and Distribution, 1.

CONTINUANCE. See Courts, 28.

CONTRACTS. See Appeal and Error, 1; Limitation of Actions, 2; Principal and Agent, 1, 8; Vendor and Purchaser, 2; Carriers of Freight, 1; Courts, 11; Insurance, Life, 3; Actions, 7; Municipal Corporations, 5; Insurance, Fire, 1; Negotiable Instruments, 1; Statute of Frauds, 1.

1. *Contracts—Consideration—Evidence—Questions for Jury—Trials.*—In an action by a contractor to recover of the owner an additional amount to that specified in the contract to erect a house, evidence that the owner required the contractor to employ a certain class of labor, that increased the cost sixteen hundred dollars over the original estimate, of which the contractor agreed to lose four hundred dollars and the owner twelve hundred dollars, is sufficient as a legal consideration for the promise of the owner to pay the twelve hundred; and in this case it is for the jury to decide the questions raised, whether the new contract was to take effect only when reduced to writing and signed by the parties, or whether the alleged promise was made before or after the making of the original contract, or required a contractor's bond as a condition precedent to its taking effect. *Brown v. Owens,* 18.

2. *Contracts—Breach—Evidence—Declarations.*—Where the defendant has rejected certain yarns shipped by plaintiff as not coming up to contract, statements in plaintiff's letters to defendant that these yarns had been shipped to others without objection, as tending to show that defendant should have accepted them, are self-serving and properly excluded as evidence in plaintiff's favor; especially when it appears that the plaintiff accepted the returned shipments without objection. *Cotton Mills v. Hosiery Mills,* 33.

3. *Contracts—Breach—Evidence—Substantial Compliance—Trials—Questions for Jury.*—The plaintiff contracted to deliver to the defendant

CONTRACTS—*Continued.*

"approximately 1,000 pounds" of yarn a month, for a certain year at a stipulated price: *Held*, a subsequent correspondence between the parties showing that plaintiff understood the contract as calling for sufficient yarns for that year to meet defendant's requirements, approximating 12,000 pounds, is sufficient upon which to submit to the jury the issue, "Did the plaintiff contract to deliver to defendant 12,000 pounds of cotton yarns?" etc., there being evidence that the plaintiff only shipped 11.244 pounds, and the defendant had to buy the deficiency on a rising market. *Ibid.*

4. *Contracts— Breach— Damages— Lands— Vendor and Purchaser.*—The measure of damages for the breach of the vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest. *Howell v. Pate*, 117.

5. *Contracts, Written— Land— Equity— Contracts to Convey—Breach—Evidence.*—Time is not of the essence of a contract to convey land, and it is competent for the purchaser to show that he had tendered the balance of the purchase price in accordance with a parol agreement made between the parties before and after the time specified in the writing, and the statute of frauds has no application. *Ibid.*

6. *Contracts—Death of Party—Survival of Action—Executors and Administrators.*—Ordinarily a contract made by a person who has since died without performing his obligations thereunder is binding upon his executors and administrators, with exception only when from the nature of the contract it required his personal performance, or from its terms it is ascertained that such was the intention of the parties. *Burch v. Bush*, 125.

7. *Same—Timber—Lumber.*—A contract to cut standing timber and manufacture it into lumber, according to specifications set out in the written agreement, is not alone such an one as to require the personal performance of the party obligated, and an action thereon survives against his executors and administrators, who must either have it performed or remain liable in damages for its breach. *Ibid.*

8. *Same—Breach—Performance Prevented—Quantum Meruit.*—Where a death of a party to a contract does not relieve his estate from liability thereunder, and the other party abandons his contract or will not permit the personal representatives to proceed, it will relieve the personal representatives from this obligation, and permit them to recover as upon a *quantum meruit*, for the work done or services rendered under the contract by their intestate in his lifetime. *Ibid.*

9. *Contracts—Breach -Death of Party—Payments—Mistake—Damages—Counterclaim.*—Where, under a contract to cut and manufacture lumber, there is a provision for the owner to make partial payments as the work progresses, which has been terminated by the death of the other party, it is competent for the surviving party to show that he has made the partial payments in excess of those required by his contract through his mistake or misapprehension, as a counterclaim in an action thereon by the personal representatives of the deceased party. *Simms v. Vick*, 151 N. C., 78; *Worth v. Stewart*, 122 N. C., 258, cited and approved. *Ibid.*

CONTRACTS—*Continued.*

10. *Contracts, Written—Negotiations—Merger—Parol Evidence.*—Negotiations and conversations leading up to the execution of a written contract merge in the writing, and may not be received in evidence when contradictory of its terms. *Mfg. Co. v. McPhail*, 205.

11. *Same—Vendor and Purchaser.*—A written contract may not be contradicted by a parol contemporaneous agreement, and when a vendor and purchaser of merchandise have expressed in writing that freight allowance should be made to a certain point of transportation, parol evidence contemporaneous with the writing that the vendor contracted to make such allowance to a final destination is incompetent. *Ibid.*

12. *Same—Abrogation—Annulment—Subsequent Agreements.*—The principle by which contemporaneous parol evidence is inadmissible to vary the written terms of the contract does not apply to a subsequent agreement between the parties whereby, for a consideration, the written contract has been abrogated or annulled. *Ibid.*

13. *Same—Freight Allowances.*—The written contract between the vendor and purchaser that the former would make a freight allowance on the shipment of the merchandise to a certain point may be modified by parol evidence tending to show that since the making of the written contract they had agreed, in consideration of the purchaser's ordering out the goods, which otherwise he was not obligated to do, that the vendor would pay the freight to its destination. *Ibid.*

14. *Same—Bills and Notes—Conditions Precedent.*—The vendor and purchaser of fertilizer entered into a written contract for the supply of fertilizer during the season should the latter order it out at a certain price, and freight allowance to a certain point *en route*, and thereafter the purchaser gave his note, including full freight to destination, for the fertilizer he had received: *Held*, parol evidence was competent to show that the notes were accepted by the vendor on condition that they were to be returned unless full freight charges to destination should be credited on them, not as contradicting the written contract, but as explaining the conditions under which the notes were given and accepted, and as tending to show that the written contract had not been consummated. *Ibid.*

15. *Contracts—Vendor and Purchaser—Fertilizer—Agricultural Department—Analysis—Statutes—Damages.*—A contract for the sale of fertilizer, specifying that the customer could only recover the difference between the contract price and the actual value of the goods in case of deficient analysis, to be determined by the State Agricultural Department from samples furnished by the customer, which analysis shall be conclusive as the best and only test, both by the statute and the contract, excludes parol evidence as to the effect the fertilizer had upon the crop grown upon the land, or as to the fertilizer containing an injurious element which the analysis and certificate made by the State Chemist expressly excluded. C. S., 4690, *et seq.* *Fertilizer Co. v. Thomas*, 274.

16. *Same—Contractual Rights.*—Under the provisions of C. S., 4697, that the analysis of the State Agricultural Department shall be *prima facie* proof that the fertilizer was of the value and constituency shown by his analysis, "but that nothing in this article shall impair the right of contract," leaves it open for the parties to make their own terms

CONTRACTS—*Continued.*

by contract as to damages to the crop to be grown upon the lands, but parol evidence to show damage to crops is properly excluded when the parties by their contract have expressly agreed that the analysis of the State Chemist shall be the only test as to the quality of the fertilizer, and it has been thereby ascertained that the fertilizer furnished was in accordance with the contract. *Ibid.*

17. *Same—Evidence—Fraud.*—Where it appears from the contract of sale of fertilizer that the vendor's warranty was that the goods should come up to the analysis upon the bags, and any deficiency should be determined by the analysis of the State Chemist under our statute, which should be conclusive as to damages claimed by the purchasers, and by this test the fertilizer has been found to be free from borax or other matter deleterious to crops, parol evidence tending to show that the fertilizer furnished did contain borax from the appearance or condition of the crop is properly excluded upon an allegation of fraud, whether it comes from expert witnesses or others, as the analysis, under the agreement of the parties, is conclusive as to the ingredients of the fertilizer, and as to the recovery of damages to the crop it is a bar. C. S., 4690, *et seq.* *Ibid.*

18. *Contracts—Breach—Damages—Gains Prevented—Vendor and Purchaser.* The principle upon which a recovery of damages for gains prevented as well as loss sustained by the breach of a party to the contract applies to such damages as may fairly be supposed to have entered into the contemplation of the parties at the time the contract was made, and such as may naturally be expected to follow its violation, both certain in their nature and in regard to the cause from which they proceed. *Sprout v. Ward*, 372.

19. *Same—Evidence—Appeal and Error—Reversible Error.*—Where, in an action to recover the purchase price of a flour mill, the defendant sets up as a counterclaim in damages that the mill in question caused him a loss of patronage because it would not make good flour, whereby the plaintiff had breached his contract, the testimony of a witness in defendant's behalf, on the measure of damages, that he was not certain that he would otherwise have patronized the mill, but it was "likely" that he would have done so, is too uncertain for the jury to find an affirmative fact thereon, and its admission is prejudicial to the plaintiff and constitutes reversible error. *Ibid.*

20. *Same—Warranty.*—The measure of damages for the vendor's breach of contract in furnishing the purchaser with a flour mill that would not grind good flour is the difference between the value of the mill as the vendor contracted it would be, depending upon the nature of the contract of sale, or the warranty expressed or implied, and the value of the one delivered. *Ibid.*

21. *Contracts—Principal and Agent—Consideration—Expenses—Net Profits.* Where the principal breaches his contract to compensate his agent employed upon a stated salary and expenses, and a part of the profits derived from the sale of junk, old rags, etc., the agent, as such, was to purchase, the word "profit" as used contemplates, nothing else appearing, the net profits after deducting the expenses. *Samet v. Klaff*, 502.

CONTRACTS TO CONVEY. See Contracts, 5.

CONTRACTUAL RIGHTS. See Contracts, 16.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1; Automobiles, 2, 5; Evidence, 4; Railroads, 8, 13; Employer and Employee, 1.

CORPORATIONS. See Removal of Causes, 2, 3; Constitutional Law, 2.

1. *Corporations—Principal and Agent—Torts.*—Corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees, when committed in the course and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person, growing out of the conditions existing between them, an instance of this last rule of liability not infrequently presented from the relationship of carrier and passenger. *Clark v. Bland*, 110.

2. *Same—Evidence—Nonsuit—Trials.*—Upon a motion to nonsuit, the evidence which makes in favor of plaintiff's claim must be accepted as true, and construed in the light most favorable to him, and defendant's evidence *per contra* will not be considered. *Ibid.*

3. *Corporations — Public-service Corporations— Discrimination— Credit—Issues—Questions for Jury—Trials.*—Where *mandamus* is sought to compel a public-service corporation to furnish its goods or products to the plaintiff without discrimination, and the pleadings set at issue the question as to whether the plaintiff was ready, able, and willing to pay a reasonable rate therefor, a question of fact is raised for the determination of the jury, the law not requiring a public-service corporation or any other to sell its goods or products to an insolent concern on a credit. *Public Service Co. v. Power Co.*, 357.

CORRECTIONS. See Courts, 25.

COSTS. See Appeal and Error, 48.

COUNSEL'S FEES. See Clerks of Court, 2.

COUNTERCLAIM. See Contracts, 9; Courts, 9, 11.

COUNTY. See Deeds and Conveyances, 4; Constitutional Law, 2, 7, 11, 15, 19, 21; Elections, 1; Judgments, 5, 8; Statutes, 6.

COUNTIES.

Counties—Title—Public Squares—Abutting Owners—Prescriptive Rights. Where a county continues in possession of its open public square continuously to the time of its recent deed to a purchaser, an adjoining owner cannot acquire a prescriptive right of easement therein. *Barker v. Ins. Co.*, 268.

COUNTS. See Criminal Law, 5; Pleadings, 5; Indictment.

COUNTY COURTS. See Courts, 2, 4.

COURTS. See Drainage Districts, 3; Criminal Law, 4, 15, 17; Trusts, 1; Arbitration and Award, 1; Appeal and Error, 14, 19, 20, 42, 49, 50; Statutes, 6, 7; Instructions, 6; Indictment, 1; Intoxicating Liquors, 14; Homicide, 11; Judgment, 6, 7.

COURTS—*Continued.*

1. *Courts— Jurisdiction— Process— Nonresidents—Witnesses—Attachment —Replevy Bond.*—A nonresident who comes into this State for the sole purpose of prosecuting his action in our courts and acting as a witness in his own behalf, is not subject to civil process, allowing him a reasonable time for coming and going, nor does he voluntarily submit to the jurisdiction of our courts by merely giving a replevy bond in proceedings for his personal baggage which was attached while he was here on that business. *Winder v. Penniman,* 7.

2. *Courts—Pleadings—County Courts—Statutes.*—The provisions of C. S.. 476, 505, 509, as to filing pleadings before the clerk of the Superior Court, was to expedite the trial of causes, and has no application to the county court of Forsyth, where, owing to the large volume of business on account of the size and importance of its principal city, the terms of court occur monthly, or oftener. *Guano Co. v. Supply Co.,* 210.

3. *Same—Repealing Statutes.*—The provisions of a special local act creating a county court, relating to the filing of pleadings, etc., are not repealed by the general statute. C. S., 8106. *Ibid.*

4. *Courts — County Courts — Jurisdiction — Process — Superior Courts — Statutes.*—Sec. 9, ch. 520, Public-Local Laws 1915, creating the county court of Forsyth, providing that process of the county court, while exercising concurrent jurisdiction with justices' courts, shall not run outside of the county, "but in all other cases its process shall run as process issuing out of the Superior Court," merely authorizes service, in such other cases, to run outside of the county to the same extent as authorized for service issuing out of the Superior Court. *Ibid.*

5. *Courts—Jurisdiction—Statutes—Superior Courts—Justices of the Peace.* The Superior and justices courts are of concurrent jurisdiction in actions to recover personal property to the value of fifty dollars, and the former has exclusive jurisdiction when the property in controversy exceeds that sum. C. S., 1474. *Sewing Machine Co. v. Burger,* 241.

6. *Same—Mortgages—Equity.*—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt. the Superior Court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. *Ibid.*

7. *Courts—Jurisdiction—Constitutional Law—Superior Courts—Justices of the Peace.*—While under the provisions of the Constitution of 1868, Art. IV, sec. 33, the courts of the justice of the peace were given "exclusive original" jurisdiction in matters founded on contract when the amount involved did not exceed two hundred dollars. etc.. the Convention of 1875 removed the restriction of legislative powers as to the jurisdiction of the Superior Court by eliminating the words "exclusive original" relating to the powers of justices' courts. *Ibid.*

8. *Courts—Jurisdiction—Justices of the Peace —Superior Courts—Statutes.* Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by C. S., 1473, to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. *Ibid.*

COURTS—*Continued.*

9. *Same—Counterclaim.*—Where an action on contract has originally and properly been brought in the Superior Court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the Superior Court, will not be denied for want of jurisdiction, on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of C. S., secs. 519, 521, and 602. *Ibid.*

10. *Courts—Superior Courts—Jurisdiction—Inferior Courts.*—The jurisdiction of the Superior Court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts. *Ibid.*

11. *Courts—Justices of the Peace—Jurisdiction—Contracts—Counterclaims.* Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment, as a bar to the plaintiff's demand. *Ibid.*

12. *Courts—Justices of the Peace—Jurisdiction—Equity—Defenses.*—A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. *Ibid.*

13. *Courts—Jurisdiction—Constitution—Statutes—Rule of Property—Procedure.*—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the Superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Ibid.*

14. *Courts—Justices of the Peace—Judgments—Appeal—Process—Service.* Where the defendant has not properly been served with summons according to the provisions of the statutes, it is not required that he appeal within fifteen days after notice of the rendition of a judgment in the court of a justice of the peace. *Herndon v. Autry*, 271.

15. *Courts—Inherent Powers—Interpreter—Wills—Records.*—The court has inherent power to appoint a duly qualified interpreter to act in that capacity upon the probate of a will written in a foreign language and offered for probate in the courts of this State. It is suggested that the original will be copied on the record with its translation. *Wise v. Short*, 320.

16. *Courts—Jurisdiction—Justices of the Peace—Appeal—Superior Courts—Equity.*—The courts of justices of the peace have no jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor will the Superior Court acquire such jurisdiction on appeal. *Morganton v. Millner*, 364.

17. *Courts—Discretion—Argument to Jury—Opening and Conclusion—Trials.*—Where both parties to the action have introduced evidence on the trial, the right to open and conclude argument is discretionary with the trial judge, and not reviewable on appeal. Supreme Court Rules Nos. 3 and 6. 164 N. C., 562-3. *Lumber Co. v. Elizabeth City*, 442.

COURTS—*Continued.*

18. *Courts—Discretion—Trials—Remarks of Counsel—Statutes—Arguments—Jury.*—It is not error for the trial judge, in his discretion, to stop an attorney from reading the facts from an opinion in a related case, which would have the effect of unduly prejudicing the consideration of the jury upon the evidence, and confining him strictly to the law, where the attorney was exceeding his privilege and when there was no restriction as to his arguing the law to the jury upon the facts, and especially when the court subsequently charged them accurately and impartially thereon, following the decision in the case from which the attorney proposed to read. *Forbes v. Harrison*, 462.

19. *Courts—Jurisdiction—Recorder's Court—Justices of the Peace—Statutes—Concurrent Jurisdiction.*—A recorder's court given concurrent jurisdiction with the court of a justice of the peace within the county had jurisdiction in this case over the offense of reckless driving, made a criminal act by C. S., 2618. *S. v. Mills*, 531.

20. *Courts—Statutes—Jurisdiction—Inferior Courts.*—Where a statute creating a municipal court does not give it criminal jurisdiction over the offense of driving automobiles upon a public highway or street, while intoxicated, etc., this jurisdiction is acquired by Laws 1919, now C. S., 4506, to the extent only of binding the defendant over to the Superior Court upon conviction. *S. v. Jones*, 543.

21. *Same—Appearance—Appeal Bond—Presumptions.*—The bond of the defendant given upon being bound over from an inferior to the Superior Court is for his appearance and answering in the Superior Court, and the recital in the bond that it is an appeal is immaterial when the upper court in fact had original jurisdiction of the offense. *Ibid.*

22. *Courts—Inferior Courts—Appeal—Superior Courts—Criminal Law—Misdemeanor—Indictment.*—Upon an appeal from an inferior court to the Superior Court from a conviction of a petty misdemeanor, the necessity of a bill of indictment in the latter court is dispensed with. *Ibid.*

23. *Courts—Jurisdiction—Juvenile Courts—Investigation—Justices of the Peace—Statutes.*—The juvenile court, as a separate part of the Superior Court, is given, by C. S., 5039, among other things, the sole power to investigate charges of misdemeanors, and of felonies with punishment not exceeding a ten-year imprisonment, made against children between the ages of fourteen and sixteen years, at the time of the offense committed, and excludes the jurisdiction of the justice of the peace to bind them over to the Superior Court in such instances. *S. v. Burnett*, 179 N. C., 735, cited and applied. *S. v. Coble*, 554.

24. *Same—Assaults—Deadly Weapon—Superior Court—Transfer of Causes—Removal of Causes.*—The juvenile court has exclusive jurisdiction over investigating a charge of an assault with a deadly weapon, inflicting a serious injury, made by a child within sixteen years of age, and where a justice of the peace has assumed jurisdiction and bound the defendant over to the Superior Court, the case will, on motion, be removed to the juvenile court, to be proceeded with as the statute directs, though at the later date the offender's age may be more than sixteen years. C. S., 5039. *Ibid.*

COURTS—*Continued.*

25. *Courts—Juvenile Courts—Jurisdiction—Correction—Infants—Children—Minority—Statutes.*—Where the jurisdiction of the juvenile court has once attached it remains during the minority of the youthful offender, for the purpose of his correction and reformation. S. C., 5039. *Ibid.*

26. *Courts—Discretion—Evidence—Conduct of Trial.*—The trial judge has discretionary power to control the order of the admission of the testimony, which is not reviewable when no substantial right of the appellant is thereby impaired. *S. v. Harris*, 600.

27. *Same—Introduction of Witnesses—Cross-examination—Waiver—Homicide.*—It is not an abuse of the discretion of the trial judge in directing the admission of testimony relating to the mental capacity of the prisoner to permit medical expert witness for the State, at his own request, and for good reason shown, to give his evidence during the taking of the prisoner's evidence, when plenary evidence has been introduced upon which to base the hypothetical questions, nor will it be held for error that the time allowed for the taking of this evidence was insufficient for the prisoner's cross-examination, when it appears from the case on appeal, settled by the judge, that this witness left the stand with the consent of the prisoner's counsel. *Ibid.*

28. *Courts—Terms—Statutes—Continuance from Day to Day—Entries—Records—Homicide.*—Daily entries on the journal during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, is a sufficient compliance with C. S., 4637, providing, among other things, "that in case the term of a court shall expire while a trial of a felony shall be in progress and before judgment shall be given therein, the court shall continue the term as long as in his opinion it shall be necessary for the purposes of the case." *Ibid.*

COURT'S DISCRETION. See Constitutional Law, 31, 32; Criminal Law, 7; Trials, 2, 3.

COURT'S JURISDICTION. See Warehousemen, 1.

COVERTURE. See Limitation of Actions, 3.

CREDIT. See Corporations, 6.

CREDITORS. See Sales in Bulk, 2.

CRIMINAL LAW. See Intoxicating Liquors, 2.

1. *Criminal Law—Evidence—Corroboration.*—Testimony in corroboration of the evidence of the prosecuting witness in a criminal action, in contradiction of the prisoner's testimony tending to establish an alibi, is competent. *S. v. Rhodes*, 481.

2. *Criminal Law—Abortion—Pregnancy—Destruction of Unborn Child—Drugs—Advice—Intent—Indictment—Evidence.*—Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine, or

CRIMINAL LAW—*Continued.*

substance with intent to destroy the child is sufficient for a conviction under C. S., 4226, the advice and intent for the stated purpose being indictable under our statute. Rev., 3618 and 3619. *S. v. Powell*, 515.

3. *Criminal Law—Automobiles—Statutes—Reckless Driving.*—Where a statute makes it a misdemeanor for careless or reckless driving of automobiles on public highways with regard to the width of the highway, or traffic thereon, and to the danger of life, limb, or property of persons thereon, and by proviso fixing varying speed limits for automobiles outside of and within incorporated cities or towns, making the violation of speed limits negligence *per se*, the legislative placing of these limits does not exclude a conviction for violating the preceding provisions of the statute at a less speed. C. S., 2618. *S. v. Mills*, 530.

4. *Criminal Law—Indictment—Separate Offenses—Courts.*—An act defining separately the reckless or careless driving of automobiles upon public highways, with reference to the streets in residential and business portions of incorporated cities and towns, and on the public highway outside of them, making a violation thereof a misdemeanor, states several offenses, each of which is a separate crime, independent of the other. *Ibid.*

5. *Criminal Law—Indictment—Several Counts—Verdict.*—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. C. S., 4622. *Ibid.*

6. *Criminal Law—Statutes—Classification of Offenses—Legislative Discretion—Constitutional Law.*—The classification of criminal offenses and their punishment is a statutory regulation referred very largely to legislative discretion, and in its exercise may not be interfered with by the courts unless in clearly arbitrary instances. *S. v. Stokes*, 539.

7. *Criminal Law—Statutes—Automobiles—Highways—Intoxicants—Sentence—Court's Discretion.*—The intent of C. S., 4506, is to protect the public from the danger of intoxicated persons, etc., driving automobiles on public highways and streets, and the punishment imposed, being restricted by the statute to a minimum as to fine or imprisonment, is left to the sound discretion of the trial judge. *S. v. Jones*, 543.

8. *Criminal Law—Indictment—Waiver—Statutes—Pleas.*—The defendant, charged with a misdemeanor not containing the element of fraud, deceit, or malice, may, on his appeal to the Superior Court, waive the bill of indictment and the grand jury's action thereon, by appearing and entering a plea of guilty, under C. S., 4610. *Ibid.*

9. *Criminal Law—Statutes—Sentence—Cruel and Unusual Punishments.* A sentence of the Superior Court for two years on the public road for violating C. S., 4506, in running an automobile upon the public highways or streets by one intoxicated, etc., cannot be held as a matter of law on appeal as the unconstitutional imposition of a cruel or unusual punishment. *Ibid.*

10. *Criminal Law—Assault on Female—Indictment—Age of Defendant—Statutes.*—It is not necessary for the defendant's age to be stated in

CRIMINAL LAW—*Continued.*

the bill of indictment to convict him for an assault on a female, etc., when the proof clearly showed that he was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact. *S. v. Jones*, 546.

11. *Criminal Law—Larceny—Felonious Intent—Instructions.*—Although the trial judge has stated correctly the contention of the defendant as to guilty knowledge, it was error for him to exclude from the consideration of the jury certain evidence which the defendant offered to disprove, and which tended to disprove, such guilty knowledge or felonious intent. *S. v. Jessup*, 548.

12. *Criminal Law—Larceny—Evidence—Felonious Intent.*—In order to show that there was no felonious intent or guilty knowledge in taking or receiving an automobile, it is competent for the defendant to show that the party who took the car, which was similar to one which he himself owned, did so by mistake, believing the car to be the one which belonged to him or his employer, and this would be competent evidence on behalf of the defendant, indicted for receiving the car knowing it to be stolen, as it tended to show an absence of felonious intent of the person who took the car, and, therefore, an absence of guilty knowledge by the defendant, who afterwards received it. *Ibid.*

13. *Criminal Law—Conspiracy—Indictment—Evidence—Others Not Named—Instructions—Appeal and Error.*—Where the bill of indictment charges a conspiracy resulting in the commission of a crime by persons named in the bill and others, and there is evidence thereof not only as to those named but also as to others, a charge that it takes more than one person to make a conspiracy, but confining the definition of conspiracy to a conviction of more than one of the parties defendant, is reversible error, in leaving out of consideration the evidence that one of those named in the bill may have conspired with others not named therein. *S. v. Diggs*, 550.

14. *Criminal Law—Rape—Assault With Intent—Evidence—Nonsuit—Trials.* Upon the trial for an assault upon a female with intent to ravish, evidence that the defendant, living in the same house, entered the room of the prosecutrix at night through the partly open door to her room, and while she was asleep, placed his hand upon her hand and upon her forehead, and immediately left upon her waking and ordering him to do so, is insufficient to convict under the charge of an intent to ravish her or to effect his unlawful purpose without her consent, and on this count a judgment as of nonsuit should be granted under the statute. *S. v. Hill*, 558.

15. *Same—Indictment—Court—Assault Upon a Female—Evidence—Nonsuit—Trials.*—Where the charge in the bill of indictment is an assault with the intent to ravish, the defendant, upon sufficient evidence, and if he is over the age of eighteen years, may be convicted of an assault upon a female, under the terms of our statute, as if this charge had been stated as a separate count; and evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her hand and upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though insufficient for a conviction of the intent to ravish her. *Ibid.*

CRIMINAL LAW—*Continued.*

16. *Criminal Law—Husband and Wife—Abandonment—Statutes—Limitation of Actions.*—Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh "abandonment and failure to support," made a misdemeanor by C. S., 4447, and an indictment found within two years therefrom is not barred by the statute of limitations. *S. v. Beam*, 597.

17. *Criminal Law—Husband and Wife—Abandonment—Actions—Venue—Courts—Jurisdiction.*—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is indictable under the laws of this State in the county of her residence. C. S., 4447. *Ibid.*

18. *Criminal Law—Husband and Wife—Abandonment—Justification.*—A conviction of a willful abandonment by the husband of his wife is equivalent to a finding that he has left her without justification. C. S., 4447. *Ibid.*

19. *Criminal Law—Husband and Wife—Abandonment—Support—Indictment—Evidence—Burden of Proof.*—Upon a trial under an indictment of the husband for the abandonment of his wife (C. S., 4447), both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. *Ibid.*

CRIMINAL NEGLIGENCE. See Automobiles, 7.

1. *Criminal Negligence—Statutes.*—Where one is tried for the reckless driving of an automobile made criminal by our statute (C. S., 2618), and an unintentional killing has been established by him, evidence is sufficient for conviction of manslaughter which tends to show such recklessness or carelessness as is incompatible with a proper regard for human life or limb, or that such injury was likely to occur under the circumstances. *S. v. Rountree*, 535.

2. *Same—Manslaughter.*—The commission of a dangerous act, in itself a violation of a statute, intended to prevent injury to the person, when death to another ensues renders the actor guilty of manslaughter at least. *Ibid.*

3. *Criminal Negligence—Statutes—Speed Limits.*—Where an act makes reckless driving of automobiles upon the public highways, under certain conditions, a criminal offense, and there is a proviso fixing various speed limits thereon as to different localities and conditions criminal negligence *per se* and indictable, the proviso as to the speed limits does not necessarily preclude conviction of the offense prescribed in the body of the act for recklessness while driving at less speed. *Ibid.*

CROPS. See Deeds and Conveyances, 19.

CROSS-EXAMINATION. See Courts, 27; Homicide, 9.

CROSSINGS. See Railroads, 2, 3, 5, 6, 8, 9, 10.

CUMMINGS AMENDMENT. See Carriers of Freight, 2.

CUSTOM. See Carriers of Freight, 7.

CY PRES. See Trusts, 2.

DAMAGES. See Nuisance, 1, 2; Libel and Slander, 3, 5, 7; Drainage Districts, 2; Carriers of Passengers, 7; Instructions, 1, 2; Principal and Agent, 2; Vendor and Purchaser, 2; Contracts, 4, 9, 15, 18; Deeds and Conveyances, 19; Municipal Corporations, 1; Carriers of Freight, 4, 6; Sheriffs, 3; Abduction, 1; Appeal and Error, 23.

Damages—Personal Injury—Disfigurement—Humiliation.—Where there is evidence tending to show that the *feme* plaintiff had been physically disfigured on account of an injury negligently inflicted, entitling her to recover damages, testimony in her behalf, as to the measure of damages, that the injuries so received were embarrassing and humiliating to her is competent. *Parker v. R. R.*, 96.

DANGER. See Railroads, 12.

DANGEROUS INSTRUMENTALITIES. See Evidence, 1; Negligence.

DAYS OF GRACE. See Insurance, Life, 4.

DEADLY WEAPONS. See Courts, 24.

DEALERS. See Sales in Bulk, 4.

DEATH. See Contracts, 6, 9.

DEBT. See Statute of Frauds, 1.

DEBTOR AND CREDITOR. See Compromise, 1.

DECEIT. See Warehousemen, 2.

DECISIONS. See Judgments, 7.

DECLARATIONS. See Contracts, 2; Evidence, 6, 7.

DEDICATION. See Easements, 2. 3.

DEEDS AND CONVEYANCES. See Actions, 1; Judgments, 8; Betterments, 3; Evidence, 6, 16; Clerks of Court, 1; Equity, 1; Estates, 1, 2; Limitation of Actions, 3, 4; Statutes, 3; Easements, 3.

1. *Deeds and Conveyances—Delivery—Payment of Purchase Price—Equity—Estates—Evidence.*—Where a grantee in a deed necessary to establish plaintiff's chain of title has died before delivery of the deed, it is necessary for his heirs at law to successfully claim an equitable estate in the lands covered by the deed, to establish payment by their ancestor by sufficient evidence, and in the absence of a finding thereon, it cannot be so declared as a matter of law. *Cedar Works v. Shepard*, 13.

DEEDS AND CONVEYANCES—*Continued.*

2. *Deeds and Conveyances—Tax Deeds—Affidavits—Presumptions—Statutes.*—Under the provisions of ch. 137, sec. 70, Public Laws of 1887, it is required that a purchaser at the sheriff's sale of land for taxes show, by affidavit, a compliance with the provisions of the statute, and present it to the one authorized by law to execute the tax deed, and by such officer delivered to the register of deeds for entry of record, which must be by evidence outside the deed, and there being no presumption under section 74 of said chapter that this has been done, in the absence of such proof, the purchaser acquires no title. *Ibid.*

3. *Same.*—Sections 60, 70, and 71 of the acts of 1887, relating specifically to matters and things required to be done by the purchaser at a tax sale, to perfect his title to the lands, are omitted by the act of 1889, while sec. 74 of the former act, relating to presumptions, is expressly brought forward with practically no modifications, and hence a tax deed made under the provisions of the act of 1889 is valid without proof of the affidavit, etc., required by the act of 1887. *Ibid.*

4. *Deeds and Conveyances—Tax Deeds—County.*—A sheriff's deed to land sold for the nonpayment of taxes lying within his own and an adjoining county is valid only as to so much of the land as lies within his own county, and of no effect beyond its boundary. *Ibid.*

5. *Deeds and Conveyances—State Board of Education—State's Lands—Grants.*—Where the plaintiff claims lands under a deed from the State Board of Education executed in 1904, and *mesne* conveyances, and it appears that the State had granted it to others in 1784 and 1792, his title will fail, for the deed from the State Board of Education has no legal effect when State grants covering the same lands are shown to have been issued prior to 1825. *Weston v. Lumber Co.*, 162 N. C., 165, cited as controlling. *Ibid.*

6. *Deeds and Conveyances—Seals—Presumptions.*—Where a deed acknowledged before a commissioner of affidavits in another state, conveying lands here, does not show the affixing of the commissioner's seal on the record, but this fact is recited in the conveyance, the seal will be presumed, and the validity of the deed will be upheld, nothing else appearing to the contrary. *Sluder v. Lumber Co.*, 69.

7. *Deeds and Conveyances—Fee—Heirs—Wills—Devises—Intent.*—While prior to 1879 (C. S., 991) the word "heirs" was generally necessary to create a fee-simple estate, there is exception as to devises and equitable estates, and these may pass without the word "heirs" if such intention appears by correct interpretation of the instrument. *Whichard v. Whitehurst*, 79.

8. *Same—Interpretation—Intent.*—Where it appears from the construction of a deed made in 1871 that the land granted was to his daughter in lieu of her share in the grantor's estate, the construction of this deed will be governed by the principles applicable to the interpretation of devises and equitable estates arising under a will, when expressed in the instrument as being in the nature of, or a substitute for, a devise. *Ibid.*

9. *Same—Estates—Tenants in Common.*—Where, in 1871, a father has conveyed certain of his lands to his daughter, "and her nearest blood relations," in lieu of her share in his estate, and from the interpreta-

DEEDS AND CONVEYANCES—*Continued.*

tion of the instrument as a whole this intent clearly appears, and is evidenced by the donor's express language, such intent will control the interpretation, and the daughter takes a fee simple title to the whole, and not that of a tenant in common with her children. *Ibid.*

10. *Deeds and Conveyances—Equity—Case Agreed—Cancellation—Statutes.* While ordinarily it was necessary to invoke the jurisdiction of a court of equity to correct a deed to lands made before 1879 (C. S., 991), so as to show that in fact it was intended to convey a fee-simple title, when the word "heirs" had been omitted, yet, when the cause is submitted upon a cause agreed (C. S., 961), the court, in its equitable powers, may correct the instrument, when it clearly appears from the interpretation thereof that the donor intended to pass a fee-simple title, and had unintentionally omitted therefrom the word "heirs." *Ibid.*

11. *Deeds and Conveyances—Revocation—Estates—Merger.*—Where land is conveyed in fee, reserving a life estate to the grantors, and thereafter they make a deed to the same lands to the same grantors, conveying an absolute fee-simple title, stating its purpose to revoke the prior deed, the question of merger does not arise, and instead of being two estates, one a particular estate for life and the other a remainder in fee, the prior deed being revoked by the second one, there is but one estate, which is an absolute fee-simple one. *Butler v. Bell,* 85.

12. *Deeds and Conveyances—Mental Incapacity—Voidable Deeds—Purchaser.*—A deed by one legally incompetent to make it is not void, but valid for all purposes, until assailed or set aside at the instance of those having an interest to impeach it, and a subsequent grantee who is not an innocent purchaser for value without notice of the incapacity of the original grantor stands in the same category as his grantor. *Ibid.*

13. *Deeds and Conveyances—Voidable Deeds—Color of Title.*—A deed to lands voidable for the incapacity of the grantor to make it, is not for that reason deprived of its sufficiency as color of title. *Ibid.*

14. *Same — Purchasers — Limitation of Action — Adverse Possession.*—A grantee who has acquired a voidable title to lands under sufficiently colorable deeds, may ripen his defective title into a good one by sufficient adverse possession thereunder, which is a distinct or separate source of title from the one under which he had entered possession of the lands. *Ibid.*

15. *Deeds and Conveyances—Color—Possession—Notice.*—The possession of one under color of title is notice of his claims of title to the lands. *Ibid.*

16. *Deeds and Conveyances—Fraud—Mental Incapacity—Evidence.*—In a suit to set aside a deed for mental incapacity of the grantor, it was competent to show that she had a fall resulting in a fractured hip a year before the making of the deed, when she was of weak mind, more than eighty years of age, with the further evidence that thereafter her mental and physical condition grew worse until her death. *Boone v. Sykes,* 143.

DEEDS AND CONVEYANCES—*Continued.*

17. *Deeds and Conveyances—Fraud—Mental Incapacity—Evidence—Hypothetical Questions—Witness—Experts.*—Where the sufficiency of a deed for the want of mental capacity of the grantor to make it is in question, and the plaintiff is permitted on cross-examination to testify to the sanity of the grantor, assuming certain facts to be true, it is competent for him to testify as to his opinion if the facts were reversed, and not reversible error for the lack of supporting evidence, such being necessary to give the jury a proper estimate of the testimony of the witness. *Ibid.*

18. *Deeds and Conveyances—Fraud—Mental Incapacity—Evidence.*—Where there was evidence tending to show that the grantor in a deed, sought to be set aside for mental incapacity, was eighty years of age and of feeble mind at the time, and gradually grew worse until her death, testimony that six or eight months after executing the deed she sent for witness, stating she had no recollection thereof, but upon his recalling it to her mind recollected and was satisfied with it, is not prejudicial to the defendant; but, if otherwise, it was competent upon the question of the grantor's mental capacity at the time she executed the conveyance. *Ibid.*

19. *Deeds and Conveyances—Mental Incapacity—Consideration—Evidence—Value of Crops—Damages.*—Upon the question of the inadequacy of the consideration of a deed sought to be set aside for lack of the mental capacity of the grantor, where a witness has testified that at the time of its execution in 1917 the land was poor and sorry, with big gullies and washes on it, etc., and as to its consequent value, it is competent to show in contradiction that the following year the land yielded a good and valuable crop, without a change in the condition of the land. *Ibid.*

20. *Deeds and Conveyances—Grantee Not In Esse—Revocation—Statutes.* The provisions of the statute, ch. 498, Laws of 1893, making revocable by the grantor his deed to persons not then in being, has no application when the deed was made prior thereto, for the rights conferred thereunder are fixed at the date of its registration. *Roe v. Journigan*, 180.

21. *Deeds and Conveyances—Registration—Leases—Notice.*—The owner of the fee by a registered chain of title is not affected with notice of a ninety-nine-year lease under which an adverse party claims from a common source until the registration of the lease, no other notice being sufficient under the provisions of our statute, C. S., 3309. *Dye v. Morrison*, 309.

22. *Same—Possession of Lessee.*—The mere possession of the *locus in quo* under an unregistered ninety-nine-year lease is not sufficient notice to the owner of the fee under a valid paper chain of title. C. S., 3309. *Ibid.*

23. *Same—Limitation of Actions.*—The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. C. S., 3309. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

24. *Deeds and Conveyances—Timber—Reservation of Title—Conditions—Notice.*—A grantor of lands reserving "all wood and timber" thereon, with provisions that should the grantee divide the lands into the lots the reserved right would cease "after any building is begun," is required to give a reasonable notice of the time the reservation shall expire, when no time limit therefor is specified. *Milling Co. v. Mills Co.,* 361.

25. *Same—Equity—Cloud on Title—Suits.*—Where the grantor of lands has reserved the right to the timber growing thereon, but this right to cease if the grantee divide the lands into lots and erect buildings thereon, and the grantee, after reasonable notice to cut the timber has not done so on all of the lots, his claim of right to continue the cutting as to these remaining lots is a cloud upon the grantor's title, which he may have removed in his suit for that purpose. *Ibid.*

26. *Deeds and Conveyances—Timber Deeds—Expiration of Time Limit—Injunction—Equity.*—An order perpetually enjoining a grantee in a deed from cutting timber upon land after his right has ceased is a proper one in a suit by the owner to remove the grantee's claim of right as a cloud upon his title. *Ibid.*

27. *Deeds and Conveyances—Warranty—Breach of Warranty—Description—Reference to Prior Deeds—Maps—Actions.*—Where a deed to a large body of lands, definitely known as certain lands, excludes from the conveyance those of persons holding parts thereof under superior title, and thereafter is referred to in another deed for more full or particular description, together with a map showing the lands excluded, both the former deed and the map are to be taken as a part of the description in the later deed in the chain of the purchaser's title thereunder, and the purchaser may not recover damages for the lappage in an action brought upon the breach of warranty. *Lantz v. Howell,* 401.

28. *Deeds and Conveyances—Fraud—Evidence—Consideration.*—Where the plaintiff seeks to set aside her deed given to the defendant upon an issue of fraud, relying upon the gross inadequacy of price as evidence thereof, the question of value, upon the evidence, is a question for the determination of the jury; and in this case, *Held,* the difference of value contended for by plaintiff was not so inadequate as to have been sufficient of itself, upon the issue. *Forbes v. Harrison,* 461.

29. *Deeds and Conveyances—Fraud—Knowledge of Facts.*—Where the beneficiary has full knowledge of the facts which he claims were not revealed to him by his fiduciary and alleged as fraud in a transaction which the fiduciary has induced, it becomes immaterial as to whether the latter revealed them to him or not, as if revealed, he would have had no better knowledge of them. *Ibid.*

30. *Deeds and Conveyances—Fraud—Verdict—Instructions.*—A deed made by the beneficiary to his trustee will not be set aside for fraud on appeal, when, upon the evidence and correct instructions as to the law, the jury has found that the transaction between the parties was in every way fair and aboveboard, the consideration adequate, and no advantage taken by the fiduciary. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

31. *Deeds and Conveyances—Married Women—Privy Examination—Probate.*—The privy examination of a married woman is not invalid merely because her husband was in the same room with her at the time, when the room was sufficient in size to permit her to act separate and apart from and without any fear or compulsion of him, and her consent was given in accordance with the requirements of the law. *Ibid.*

32. *Deeds and Conveyances—Husband and Wife—Probate—Title.*—A deed by a married woman to convey her land will pass no interest therein when her privy examination has not been taken according to law. *Clendenin v. Clendenin*, 465.

33. *Deeds and Conveyances—Fraud—Undue Influence—Evidence—Questions for Jury.*—*Held*, in this case the evidence of the lack of capacity of the grantor to make a deed, attacked for fraud and undue influence, taken altogether was sufficient to take the case to the jury upon the issue submitted. *Ellis v. Barnes*, 476.

DEEDS IN TRUST. See Mortgages, 1.

DEFAULT. See Judgments, 1.

DEFEASANCE. See Wills, 10.

DEFENSES. See Pleadings, 3; Libel and Slander, 2; Courts, 12; Intoxicating Liquors, 12.

DELIBERATION. See Homicide, 7.

DELIVERY. See Deeds and Conveyances, 1; Gifts, 2, 3, 6; Government, 1; Principal and Agent, 6.

DEMAND. See Carriers of Freight, 1.

DEMURRER. See Pleadings, 2; Libel and Slander, 2; Actions, 2, 4.

DEPOT. See Carriers of Passengers, 6.

DESCENT AND DISTRIBUTION. See Estates, 4; Wills, 19.

Descent and Distribution—Estates—Contingent Remainders.—A contingent remainder, or like interest in lands is transmissible by descent. *Baugham v. Trust Co.*, 406.

DESCRIPTION. See Deeds and Conveyances, 27.

DEVELOPMENT. See Easements, 2.

DEVISES. See Deeds and Conveyances, 7; Wills, 4, 9, 12.

DIRECTOR GENERAL. See Railroads, 1; Removal of Causes, 3.

DISCRETION. See Constitutional Law, 18; Courts, 17, 18, 26, 49.

DISCRIMINATION. See Corporations, 3; Constitutional Law, 18, 30.

DISFIGUREMENTS. See Damages, 1.

DISTILLERIES. See Sheriffs, 4.

DISTRICTS. See School Districts; Trusts, 5; Drainage Districts.

DIVERSITY OF CITIZENSHIP. See Removal of Causes.

DIVORCE. See Actions, 3.

DOCKET. See Appeal and Error, 20.

DOCUMENTS. See Jury, 1.

DRAINAGE DISTRICTS. See Statutes, 8.

1. *Drainage District—Petitioners—Withdrawal of Names—Statutes.*—Upon the return day set by the clerk of the court for the hearing of the landowners in a proposed drainage district, C. S., 5284, etc., it may be shown by those opposed to the petition that some of those who signed it desired to withdraw, and that eliminating their names the petitioners would not represent a majority of the landowners in the district, or such owning three-fourths of the lands, as the statute requires. *Armstrong v. Beaman*, 11.

2. *Drainage—Canals—Duty of Abutting Owners—Cleaning Ditches—Damages.*—Where a drainage canal has been established and used as of right by abutting proprietors, in the absence of statutory or other valid contract or prescription regulation to the contrary, the obligation is upon each of the proprietors to clear out and properly maintain the portion of the canal running through his own land, and ordinarily, he has no right to compel an upper proprietor to do this for him, nor to hold him in damages for not doing it. *Craft v. Lumber Co.*, 29.

3. *Same—Statutes—Courts.*—Where the main canal for the drainage of a large area of land has been used for drainage by a number of abutting owners as a matter of right, in this case, for sixty years, or for a period of seven years or more, in the absence of contract, stipulation or statutory or prescriptive provisions, our statutes have prescribed a method to proportion the burdens of care, upkeep and maintenance of the main canal among the adjoining owners, to be determined on petition to be duly filed before a justice of the peace or clerk of the Superior Court, who shall, by commissioners or jury of view, cause the respective obligations and burdens to be ascertained and fixed and apportioned among the respective proprietors, enforceable upon the report accordingly made and confirmed. C. S., secs. 5272, 5273, 5274, 5280, *et seq.* *Ibid.*

DRUGS. See Criminal Law, 2.

EASEMENTS. See Judgments, 8, 9.

1. *Easements—Streets—Highways.*—The right to an easement in a public street or highway, as a general rule, may be acquired by grant or dedication, by the exercise of the power of eminent domain, or by user for the requisite time. *Stephens v. Homes Co.*, 335.

2. *Same — Dedication — Plats— Divisions— Maps— Land Development.*—Where lands have been platted into blocks, lots and streets, etc., and thus developed and sold by deeds referring in their descriptions to the plat, it has the effect of a dedication as between the grantors and the

EASEMENTS—*Continued.*

purchasers, not only as to the streets, etc., adjoining each purchaser, but also as to all those appearing upon the designated plat, without any authority of the grantor to change them, unless such power is specifically reserved to them. *Ibid.*

3. *Same—Deeds and Conveyances—Subdivisions—Dedication—Estoppel.*—Where the owner of several tracts of land has them platted into several subdivisions, showing blocks, lots and streets, and has sold the lots by conveyance referring each lot to its respective subdivision for description, some of these subdivisions reserving the right to alter and change streets under certain conditions, and as a part of the general scheme has heretofore mapped the entire property in general outline, showing thereon some of the streets, for the purpose of aiding investigation of title, which were never constructed: *Held*, the question of dedication and estoppel between the owner and the purchasers will apply only to the divisional map on which each lot respectively appears, and the various subdivisions will not be regarded as an integral part of the entire tract considered as a whole. *Ibid.*

4. *Same—"Key Maps."*—Where the deed of a purchaser of a lot refers for description to a divisional map of lands laid off into blocks, lots, and streets, he may not refuse title to the lot so purchased upon the ground that he would receive a smaller lot than he had purchased, because an original map in general outline, and used for an entirely different purpose in the general scheme for development, showed the adjoining street as broader and shaped differently, thus giving an easement in the *locus in quo*. *Ibid.*

5. *Same—Registration—Notice.*—Where a body of land has been platted and mapped into blocks, lots, and streets by several separate and distinct divisions, and lots sold with reference to each division respectively for description, the streets shown on the divisional map of each respective lot, as between the owner and purchaser, is dedicated to the owners of the lot therein; and the fact that a prior registered "key map," or one in general outline of the entire tract, had some streets marked thereon, will not be regarded as a dedication of those streets so as to give the purchasers any rights therein. *Ibid.*

EJECTMENT. See Actions, 1.

ELECTIONS. See Constitutional Law, 15.

1. *Elections—Counties—County-seats—Electors—Qualified Voters—Votes.* An act submitting to the voters of a county the question of the change of location of the county-seat, and providing for a large debt for the county buildings to be erected in consequence, required that unless a majority of all "the qualified voters of the county" actually "voted" in favor of one of the designated places, a second election should be held for a choice between the two places receiving the highest and the next highest "votes": *Held*, the words "qualified vote or voters" are in accordance with the intent of the statute, equivalent to the words "qualified electors," and that a majority of the qualified voters at the election would be insufficient, unless also a majority of the qualified electors of the county, whether they voted or not. *Long v. Comrs.*, 146.

ELECTIONS—*Continued.*

2. *Same—Constitutional Law—"Faith and Credit"—Statutes.*—An act permitting a county to change its county-seat, and to incur a debt for that purpose, submitting the question to the determination of a majority of the qualified voters thereof, must be approved under the provisions of our Constitution, Art. VII, sec. 7, requiring that for a county, etc., to contract a debt, pledge its faith, or loan its credit, it shall be ascertained by a majority of the qualified voters (in the sense of electors) therein, and not merely by a majority of those voting, if a less number. *Ibid.*

3. *Elections — Polling Places — Electors -- Presumptions—Notice.*—Where polling places in each township of a road district have been established for a long time and are regarded as permanent, it will be presumed that each voter within the district knew where he should register and vote on the question of bonds, and where the notice of the election complied with the law except designating the exact location of these well known polling places, the election will not be declared invalid solely on that account. *Comrs. v. Bank*, 348.

ELECTORS. See Constitutional Law, 7; Elections, 1, 3.

EMINENT DOMAIN. See Constitutional Law, 5; Easement, 2.

ELECTRICITY. See Evidence, 11.

EMPLOYER AND EMPLOYEE. See Evidence, 11; Railroads, 14, 16.

1. *Employer and Employee—Master and Servant—Automobiles—Negligence—Contributory Negligence—Evidence—Trials.*—Where there is sufficient evidence of the negligence of the driver of an automobile, which proximately caused the death of an employee while taking him to work, by turning the machine from the road over an embankment, the mere fact that the deceased was sitting on the edge of the machine with his feet on the running board, after having been requested by the driver not to do so, is insufficient alone to take the case to the jury upon the issue of contributory negligence. *Huffman v. Ingold*, 426.

2. *Employer and Employee—Master and Servant—Negligence—Duty of Employer—Provision.*—*Held*, under the facts of this case, the principle applies which relieves the employer from liability when an accident to an employee has not resulted from some omission or defect which the employer is required to fulfill, in the reasonable and proper discharge of his duties, or from which some appreciable or substantial injury might be expected to occur when tested by the standard of reasonable prudence and foresight. *Allen v. Lumber Co.*, 505.

ENDORSEMENT. See Negotiable Instruments, 1.

ENTRIES. See Courts, 28.

EQUITY. See Deeds and Conveyances, 1, 10, 25, 26; Actions, 1, 5; Contracts, 5; Warehousemen, 3; Courts, 6, 12; Trusts, 1; Appeal and Error, 14; Courts, 16.

Equity—Laches—Limitation of Actions—Deeds and Conveyances—Voidable Deeds—Merger—Adverse Possession—Color of Title.—Where a voidable but colorable deed to lands reserving a life estate has merged

EQUITY—*Continued.*

under a second and voidable deed conveying the title in fee without reservation, and such right has been acquired by a subsequent purchaser of the lands, equity will not permit an adverse claimant with notice to sleep upon his right until the purchaser has acquired title by sufficient adverse possession under the color of his deed, and then successfully assert his right. *Butler v. Bell*, 85.

ESCAPE. See Sheriffs, 2.

ESTATES. See Deeds and Conveyances, 1, 9, 11; Betterments, 1, 3; Limitation of Actions, 4; Wills, 7, 10, 12, 16, 18, 19; Descent and Distribution, 1.

1. *Estates—Wills—Defeasible Fee—Deeds and Conveyances—Estoppel.*—A devise to the testator's son, A., and should he die without issue, then the lands devised to him to be equally divided among the testator's children or their issue living at the death of A.: *Held*, the estate devised to A. is a defeasible fee, and should A. die without issue the estate would vest in his brothers and sisters living at the time of his death, and such of their children as may then be alive, in fee, as coming from the testator direct. And the death of A. not having been shown the contrary is presumed, and a deed from his brothers and sisters cannot convey an indefeasible fee-simple title to a purchaser, or estop their own children or claimants, the children of those who are deceased. *Hutchinson v. Lucas*, 53.

2. *Estates—Rule in Shelley's Case—Wills—Deeds and Conveyances.*—A limitation coming within the rule in *Shelley's case*, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. *Wallace v. Wallace*, 158.

3. *Same—Statement of Rule.*—Whenever an ancestor by any gift or conveyance took an estate of freehold, as an estate for life, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs or to the heirs of his body as a class to take in succession as heirs to him, such words are words of limitation of the estate, and conveys the inheritance, the whole property to the ancestor, and they are not words of purchase. *Ibid.*

4. *Same—Descent and Distribution.*—Where the rule in *Shelley's case* controls the express will of the grantor that the first taker shall have a life estate only, the words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate if such is according to the meaning of the express words of the instrument. *Ibid.*

5. *Same—Heirs of the Body—Children.*—The limitation to W. for life, and after his death to his heirs, if any, in fee simple, and on failure thereof to his next of kin, the word "heirs" is not used in the sense

ESTATES—*Continued.*

of general inheritors of the estate, but in the sense of issue or children, and in such case W. takes an estate for life, and the rule in *Shelley's case* does not apply. *Ibid.*

6. *Same—Next of Kin—Relationship by Blood.*—In a limitation to one for life with remainder to his bodily heirs, if any, and on failure thereof to his "next of kin," the use of the words "bodily heirs" is to be taken in the sense of issue or children; and on the death of the life tenant without such issue or children, the takers, under the term "next of kin," are the nearest blood kin to the exclusion of relationship by marriage, and also of the principle of representation, unless controlling expressions in the instrument show a contrary intent. *Ibid.*

7. *Same—Representation.*—In a limitation to W. for life, remainder to his bodily heirs, if any, and upon failure thereof, to his next of kin, on the death of W. without such heirs or issue, under the limitation to the next of kin, without more, the brothers and sisters of W., who first take, will inherit to the exclusion of nephews and nieces of W. who are the children of deceased brothers and sisters. *Ibid.*

ESTOPPEL. See Wills, 1; Judgments, 4, 5, 6, 8; Easements, 3; Partition, 1; Appeal and Error, 38.

EVIDENCE. See Criminal Law, 1, 2, 12, 13, 14, 15, 19; Intoxicating Liquors, 7, 11, 13, 17; Homicide, 1, 3, 4, 5, 6, 7, 8, 10, 11; Trespass, 1; Trials, 3, 4; Verdict, 3; Jury, 1, 2; Motions, 1; Register of Deeds, 1; Street Railways, 4; Appeal and Error, 19; Employer and Employee, 1; Issues, 2; Nuisance, 1; Instructions, 1, 4; Government, 1; Principal and Agent, 1, 3; Railroads, 3, 5, 8, 9, 10, 15; Wills, 1; Automobiles, 4, 7; Libel and Slander, 7; Sales in Bulk, 1; Carriers of Freight, 3, 7, 8; Pleadings, 3; Insurance, Life, 1, 3; Contracts, 1, 2, 3, 5, 10, 17, 19; Deeds and Conveyances, 1, 16, 17, 18, 19, 28, 33; Appeal and Error, 1, 3, 6, 22, 28, 31, 32, 35, 36, 37; Betterments, 1; Courts, 26; Carriers of Passengers, 1, 5; Corporations, 2; Intoxicating Liquors, 2, 5; Jury, 4.

1. *Evidence—Father and Son—Assault—Intervention of Son—Motive—Appeal and Error—Objections and Exceptions.*—In a civil action to recover damages for an assault, where there is evidence that the plaintiff's son went to the assistance of his father, evidence is competent which tends to show the son's motive in doing so, but it should be properly confined thereto, and its admission as to other matters tending to prejudice the defense, is erroneous. *Roberson v. Stokes,* 59.

2. *Evidence—Competent in Part—Appeal and Error—Objections and Exceptions.*—Where the evidence at the trial is partly competent, an objection thereto must specify the ground upon which it is incompetent, or the complaining party must ask the judge to restrict it within its proper limits, or it will not be passed upon on appeal. *Ibid.*

3. *Evidence—Burden of Proof—Admissions.*—Where, in an action for damages for an injury received in an assault, the defendant admits that he had assaulted the plaintiff, and pleads and introduces evidence to show justification, the admission shifts the burden of proof to him. *Ibid.*

EVIDENCE—*Continued.*

4. *Evidence—Negligence—Contributory Negligence—Burden of Proof—Railroads.*—The burden of proof is upon the defendant railroad company to show contributory negligence of a passenger in an automobile, struck while endeavoring to cross its track. *Parker v. R. R.*, 96.

5. *Evidence—Negligence—Cities and Towns—Ordinances.*—The introduction of an ordinance of a town regulating the speed of trains backing upon the track, and properly proven, C. S., 2825, and requiring a signal light to be displayed, will not be regarded as error on appeal, when it is proven that upon the evidence in the case the jury has found, upon a trial without legal error, the negligence of the defendant's employees proximately caused the personal injury for which damages were sought in the action. *Ibid.*

6. *Evidence—Declarations—Deeds and Conveyances—Tender—Refusal of Grantee—Res Gestae.*—The grantee of a deed to the same lands had two deeds from the same grantor, his father, one reserving a life estate to another, and the other conveying the fee-simple title, reciting the cancellation of the first: *Held*, to rebut the presumption of delivery of the first deed by the fact of registration, it was competent to show by a disinterested witness, testifying directly to the fact, that the grantee had refused to accept the tender of the first deed, and what had been relevantly said at the time, as a part of the *res gestae*, but not what was said after the first deed had been recorded. *Roe v. Journigan*, 180.

7. *Evidence—Declarations—Interest.*—The declarations of a grantor of a deed in the chain of title that the grantee had refused delivery, to rebut the presumption of the delivery, are in the interest of the grantor, and those claiming under him, and are inadmissible in evidence. *Ibid.*

8. *Evidence — Opinion— Nonexperts— Admissions.*—Where the defendant electric carrier by rail has practically admitted by its evidence that by the exercise of an ordinary care its motorman could have stopped its car within a certain distance, which would have avoided a collision at a public crossing, the testimony of a nonexpert witness that defendant's car could have done so under the circumstances becomes immaterial. *Costin v. Power Co.*, 197.

9. *Evidence—Opinion—Nonexperts Jury.*—A nonexpert witness may express an opinion, when he knows the conditions, of the distance within which the car of an electric carrier by rail can be stopped to avoid an injury, the subject of the suit; and a jury may, unaided, do so upon the evidence tending to show it. *Ibid.*

10. *Evidence—Witnesses—Opinion Upon the Facts.*—The exception to the general rule, which admits the opinion of a witness upon the facts, has no application where the facts may be separately stated, and the testimony is the expression of the witness's opinion of the facts at issue for the jury to determine. *Marshall v. Tel. Co.*, 292.

11. *Same—Appeal and Error—Dangerous Instrumentalities—Electricity—Employer and Employee.*—The plaintiff was employed by a telephon company as a lineman, and there was evidence tending to show th the lines of a power company, a different one, were strung upon t

EVIDENCE—*Continued.*

same line of poles, etc.; that the power company's lines at places were negligently and dangerously close to those of the telephone company, with improper insulation, and that the plaintiff's injury was caused by the high voltage of electricity on the wires of the power company communicated to the wires of the telephone company, in themselves harmless, while the intestate was engaged in the scope of his duties on his employer's wires: *Held*, the opinion of a witness that the place was not safe was improperly admitted, and constituted reversible error, the action being based on failure to provide safe place to work. *Ibid.*

12. *Evidence—Questions of Law—Trials—Trusts—Uses.*—Where the validity of an item in a will devising lands to be held in trust for certain purposes is resisted upon the grounds of insufficient available funds for the purpose and the indefiniteness of the beneficiaries, etc., the construction is one of law when the facts are not disputed, and an instruction to the jury to find the issue in the affirmative, if the jury believe the evidence, is held to be without error under the facts of this case. *Trust Co. v. Ogburn*, 324.

13. *Evidence—Appeal and Error—Negligence—Act of God—Floods—Waters.* Where the defendant is sued for damages for the negligent breaking of his dam, and there is evidence that it was caused by the act of God, testimony as to the rainfall in other localities not situated or connected with the same locality and watershed, is incompetent. *Comrs. v. Jennings*, 393.

14. *Evidence—Accounts—Admissions—Appeal and Error—Trials.*—Where itemized statements of accounts are involved in the matters in controversy in an action, an exception that they were not verified according to law becomes immaterial when they are admitted to be correct by the appellant. *Lumber Co. v. Elizabeth City*, 442.

15. *Evidence—Nonsuit—Trials.*—Where the plaintiff's claim for lumber sold and delivered to the defendant is admitted by the latter, who sets up a counterclaim in damages, his motion for judgment as of nonsuit upon the evidence cannot be sustained. *Ibid.*

16. *Evidence—Reference—Deeds and Conveyances—Color.*—In this action involving title to land, the evidence as to adverse possession under color was sufficient to sustain the finding of the referee and their confirmation by the judge. *Campbell v. Pearce*, 495.

17. *Evidence—Bloodhounds—Criminal Law.*—In a criminal action, evidence that bloodhounds, that had been trained and were accustomed to pursue the human track and found by experience to be reliable therein, had been placed upon the defendant's tracks, and followed them under such circumstances as to afford substantial assurance, or permit a reasonable inference of the defendant's identification, is sufficient to be submitted to the jury with other evidence tending to show the guilt of the defendant of the offense charged. *S. v. Robinson*, 516.

8. *Same—Nonsuit—Trials.*—Where there is evidence that the defendant, charged with a secret assault with a gun, had been pursued by bloodhounds, followed by a crowd, to his home, with further evidence that

EVIDENCE—*Continued.*

he had a grudge against the one assaulted, the condition of defendant's gun indicating that it is the one that had been used; that he left the crowd and the dogs that they had followed in his yard where the dogs had identified him, without comment or protest, having first tried to account for the actions of the dogs, and the other evidence in this case: *Held*, sufficient, upon a motion as of nonsuit, to take the case to the jury. *Ibid.*

19. *Evidence—Nonsuit—Appeal and Error.*—Where, in an action for a secret assault, the State's evidence is sufficient to take the case to the jury, upon a motion as of nonsuit, the defendant's contradictory evidence will not be considered. *Ibid.*

20. *Evidence—Nonsuit—Trials*—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. *S. v. Rountree*, 535.

21. *Evidence—Character—Truth and Veracity.*—A witness as to the character can only be question as to the general character of the defendant in a criminal action, and not as to his character for truth, unless the defendant has gone upon the stand in his own behalf, and the State has offered evidence for the purpose of impeaching his testimony as not being the truth. *S. v. Foster*, 130 N. C., 675, cited and distinguished. *S. v. Pearson*, 588.

EXCEPTIONS. See Appeal and Error; Intoxicating Liquors, 10, 17.

EXECUTION. See Sheriffs.

EXECUTORS AND ADMINISTRATORS. See Contracts.

EXPENSES. See Constitutional Law, 16, 19; Statutes, 6; Contracts, 21.

EXPERTS. See Deeds and Conveyances, 17.

EXPRESS COMPANIES. See Carriers of Freight, 8.

FACTS. See Libel and Slander, 1; Appeal and Error, 33, 43.

FAITH AND CREDIT. See Constitutional Law, 7; Elections, 2.

FATHER AND SON. See Evidence, 1; Instructions, 2; Principal and Agent, 4

FEDERAL CONTROL. See Railroads, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads, 14, 16.

FEDERAL STATUTES. See Carriers of Freight, 1; Intoxicating Liquo· 1, 5, 14, 16.

FEE. See Deeds and Conveyances, 7; Sheriffs, 4; Wills, 9, 14, 15; Estates 1.

FELONIOUS INTENT. See Criminal Law, 11, 12.

FEMALE. See Constitutional Law, 30; Criminal Law, 10, 15.

FERTILIZER. See Contracts, 15.

FIAT. See Clerks of Court, 1.

FINDINGS. See Appeal and Error, 36; Verdict, 4.

FIRES. See Municipal Corporations, 8.

FLAVORING EXTRACTS. See Intoxicating Liquors, 10, 13.

FLOODS. See Evidence, 13.

FORECLOSURE. See Vendor and Purchaser, 1; Mortgages, 1.

FORFEITURE. See Intoxicating Liquors, 18.

FRAUD. See Deeds and Conveyances, 16, 17, 18, 28, 29, 30, 33; Warehousemen, 2; Contracts, 17; Insurance, Life, 1, 2; Actions, 7.

FREIGHT. See Carriers of Freight; Contracts, 13.

FUNDS. See Trusts, 3.

GAMING. See Negotiable Instruments, 1.

GIFTS.

1. *Gifts—Causa Mortis.*—To establish a gift *causa mortis*, it must be shown that the donor intended the transfer of the subject-matter and a present actual or constructive delivery thereof, in the contemplation by the donor of his death from a present illness or some immediate peril. *Thomas v. Houston*, 91.

2. *Same—Inter Vivos—Intent—Delivery.*—Evidence that the donor had deposited money in the bank and had received a certificate therefor, payable to the order of himself, or his wife, and had deposited the certificate in his wife's trunk among his valuable papers, when he was in good health and attending to his business, is insufficient to establish a gift of the money to his wife, either *causa mortis* or *inter vivos*, and evidence that at the time he had stated to the cashier that he desired his wife to have the money in case of his death, and especially without having communicated this intent to his wife, and without further evidence of delivery, was insufficient. *Ibid.*

3. *Gifts—Inter Vivos—Intent—Delivery.*—To constitute a valid gift *inter vivos*, there must be a donative intent and a present unconditional delivery to the donee or some one for him, making a completely executed transfer to the donee of the present right of property and its possession. *Ibid.*

4. *Same—Nudum Pactum.*—To constitute a gift *inter vivos*, it is necessary to show a delivery as well as a donative intent, and without a present actual or constructive delivery it is only a promise of a gift, without consideration, and unenforceable. *Ibid.*

5. *Same—Causa Mortis.*—The chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis* are that the former is absolute, and the latter is revocable and takes effect *in futuro*, and in each instance it is necessary to show both the present intention to make the gift and the delivery of the thing given. *Ibid.*

GIFTS—*Continued.*

6. *Gifts—Inter Vivos—Causa Mortis—Possession—Delivery.*—In order to a valid gift of personal property *inter vivos* there must be an actual or constructive delivery with the present intent to pass the title, applying also to gifts *causa mortis*, with the principal distinction that the latter are made in contemplation of death from a present illness or peril, and is revocable during the life of the donor and revoked by his recovery or escape or by his surviving the donee. *Parker v. Mott*, 435.

7. *Same—Donative Intent.*—Where a chose in action is represented by a bond or other written obligation, a valid gift may be made by delivery of the instrument without endorsement with the intent to presently pass the title, and when the donee is the debtor there may be a gift of the chose in action by a destruction of the instrument with the intent to give, or a written receipt of whole or a part of the debt. *Ibid.*

8. *Same—Postponement of Enjoyment.*—Where a gift is otherwise complete, it will not be rendered ineffective merely because the enjoyment is postponed to a future date or until the death of the donor. *Ibid.*

9. *Same—Conditions.*—Where the subject of a gift is not reasonably capable of actual delivery, such is not always required; and where the payee of a note endorses the principal sum to the maker, with the present intent of a gift, but reserves the right to the interest during her life, and retains the possession of the note, this possession so retained is evidently for the purpose of enabling her to collect the interest during her life, passing to the donee all control and ownership of the principal sum, and does not affect the validity of the gift, which becomes effective at the death of the donor when the conditions have been performed. *Semble*, a written assignment is necessary to a valid gift when the subject-matter is a mere chose in action, and not evidenced by written instrument. *Ibid.*

10. *Gifts—Acceptance—Presumptions.*—Where a donor, in the presence of the donee, makes a gift to the principal of his note to him, and retains the right to the interest during her life, the latter's acceptance is presumed, nothing else appearing. *Ibid.*

GOVERNMENT. See Principal and Agent, 6; Municipal Corporations, 7.

Government—Mails—Parcel Post—Presumptive Delivery—Evidence—Rebuttal.—The delivery of a parcel-post package to the U. S. postoffice raises a presumption of its delivery to the sendee, which he may rebut by his evidence. *Green v. Vonde Co.*, 317.

GRANTS. See Principal and Agent, 6; Municipal Corporations, 7.

HEIRS. See Deeds and Conveyances, 7; Wills, 9, 14, 15; Estates, 5.

HIGHWAYS. See Easements, 1; Criminal Laws, 7.

HOLOGRAPH WILLS. See Wills, 5, 8.

HOMICIDE. See Trials, 1; Courts, 27, 28; Appeal and Error, 47.

1. *Homicide—Self-defense—Evidence—Criminal Law—Appeal and Error.* Where upon the trial for a homicide there is evidence tending to show

HOMICIDE—*Continued.*

that the deceased had drawn his pistol on his brother after a quarrel between them, at the same time threatening his life, and then they commenced shooting at each other, which resulted in death, upon the trial for a homicide the prisoner, by his own testimony, may show, with the burden of proof on him, that without default on his own part he had shot and killed under a reasonable apprehension of his own death or great bodily harm; and the exclusion of his answer to a question to the effect that he so believed when he fired the fatal shot, is reversible error on his appeal, which will entitle him to a new trial. *S. v. Robinson*, 552.

2. *Same—Instructions—Trials.*—Where evidence of self-defense is erroneously excluded on the trial for a homicide, the error is emphasized by an instruction to the jury that a verdict of guilty of manslaughter at least should be returned, unless the jury should find that the prisoner had abandoned the fight in good faith or had signified his purpose to do so before firing the fatal shot. *Ibid.*

3. *Homicide—Murder—Exclamations—Res Gestae—Hearsay Evidence—Criminal Law—Appeal and Error.*—There was evidence upon the trial of a homicide tending to show that the prisoner entered unwillingly into the fight resulting in death, and acted throughout in self-defense, and that while engaged in a struggle with the deceased the latter cut him upon the face, neck, and throat, causing a profusion of blood to flow: *Held*, it was competent for an eye-witness to testify to the exclamation of another then coming up, and as a part of the *res gestae*, that the deceased was cutting him to pieces, and not objectionable as hearsay evidence of a past transaction; and the exclusion thereof was reversible error. *S. v. Carraway*, 561.

4. *Homicide—Murder—Criminal Law—Self-defense—Threats—Communications—Evidence—Appeal and Error.*—Where the evidence is sufficient upon the question of self-defense upon the trial for a homicide, the exclusion of evidence tending to show that a near relative of the deceased had previously warned the prisoner of the deceased's threat to kill him, constitutes reversible error. *Ibid.*

5. *Homicide—Murder—Criminal Law—Dangerous Character of Deceased—Evidence—Self-defense—Appeal and Error.*—Upon the trial of a homicide, it constitutes reversible error for the trial judge to exclude evidence of the dangerous character of the deceased, when drinking, when there was evidence that he was in this condition at the time, and that the prisoner had shot and killed the deceased in self-defense. *Ibid.*

6. *Homicide—Murder—Evidence—Corroborating Circumstances—Clothing—Corroboration.*—Where the defense upon a trial for a homicide contends that another person with him at the time committed the crime, and there is evidence to convict the accused, it is competent to show the clothing worn at the time by such other person in corroboration of the State's evidence that tended to show the companion of the prisoner could not have carried his pistol in his hip pocket as the accused contended, as the clothes he was then wearing had no hip pocket in them. *S. v. Westmoreland*, 590.

HOMICIDE—*Continued.*

7. *Homicide—Murder—Premeditation—Evidence—Preconceived Intent—Deliberation.*—Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. *Ibid.*

8. *Homicide—Murder—Intent—Robbery—Evidence—Statutes.*—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by C. S., 4200, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. *Ibid.*

9. *Homicide—Cross-examination—Waiver.*—The prisoner's counsel may waive his right to cross-examine a State's witness on the trial for a capital offense. *S. v. Harris*, 600.

10. *Homicide—Husband and Wife—Evidence—Statutes—Prejudice.*—The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense is expressly excluded as evidence to the husband's prejudice by C. S., 1634, though she is competent to testify. *Ibid.*

11. *Homicide—Appeal and Error—Harmless Error—Evidence—Husband and Wife—Courts—Exclusion of Evidence.*—Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of the statute, C. S., 1634, by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. *Ibid.*

HUMILIATION. See Damages, 1.

HUSBAND AND WIFE. See Appeal and Error, 4; Deeds and Conveyances, 32; Criminal Law, 16, 17, 18, 19; Homicide, 10, 11.

IDENTIFICATION. See Sales in Bulk, 3.

IDENTITY. See Intoxicating Liquors, 7.

IMITATION EXTRACTS. See Intoxicating Liquors, 17.

IMPEACHMENT. See Verdict, 3.

IMPLEMENTS. See Railroads, 15.

INACCURACIES. See Statutes, 5.

INDEBITATUS ASSUMPSIT. See Actions, 6.

INDICTMENT. See Constitutional Law, 33; Courts, 22; Criminal Law, 2, 4, 5, 8, 10, 13, 15, 19.

Indictment—Courts—Omission of Name of Accused—Arrest of Judgment—Supreme Court—Appeal and Error.—Each count in a bill of indictment should be complete in itself, and some name therein be given the defendant, and if no name appears in the bill or in the only count in which a conviction is had, the charge is fatally defective, and the judgment must be arrested, and this will be done though presented for the first time in the Supreme Court, on appeal. *S. v. McCollum*, 584.

INFANTS. See Clerks of Court, 2; Limitation of Actions, 4; Street Railways, 4; Courts, 25; Trials, 3.

INFERIOR COURTS. See Courts.

INJUNCTION. See Warehousemen, 3; Appeal and Error, 14; Deeds and Conveyances, 26; Removal of Causes, 7; Constitutional Law, 26.

INJURY TO STOCK. See Carriers of Freight, 8.

INSTRUCTIONS. See Pleadings, 1; Carriers of Freight, 7; Bills and Notes, 2; Appeal and Error, 2, 6, 16, 21, 23, 26, 32, 35, 37, 39, 41, 45, 47; Automobiles, 4; Railroads, 8; Principal and Agent, 7.

1. *Instructions—Evidence—Assault—Damages—Appeal and Error.*—In an action to recover damages for an assault, where the evidence is conflicting as to which of the parties were in the wrong, it is reversible error for the trial judge to charge the jury upon the assumption that the version of one of them was the correct one leaving out the contention of the other party and failing to instruct thereon. *Roberson v. Stokes*, 59.

2. *Instructions—Assault—Damages—Father and Son—Intervention of Son—Questions for Jury.*—While a son may, under certain circumstances, come to the aid of his father, who is being assaulted, he is not justified in using such excessive violence as his father is not permitted to use in his own defense; and where the evidence is conflicting as to whether the father was in the wrong throughout the fight, and that he started it and was the aggressor, it is for the jury to find the facts, including the necessity of intervention by the son, and whether he kept within his privilege, and it is reversible error for the trial judge to present this question hypothetically, which assumes the facts adversely to the appellant. *Ibid.*

3. *Instructions—Opinion Contentions—Appeal and Error.*—Exceptions to the charge of the judge, on the ground of an expression of opinion on the evidence, are untenable, when considering the charge as a whole, it manifestly appears that the error complained of was in the statement of the contention of the parties, impartially expressed and with due regard to the rights of the parties. *Cotton Mills v. Cotton Mills*, 73.

4. *Instructions—Evidence.*—Upon an appeal from an instruction directing a verdict for defendant, the evidence must be taken in its most favorable aspect to the plaintiff that the jury could have considered it. *Jackson v. R. R.*, 154.

INSTRUCTIONS—*Continued.*

5. *Instructions — Requests — Substance—Prejudice.*—Giving requested instructions in substance and with slight changes not prejudicial to the plaintiff, cannot be held as error. *Forbes v. Harrison*, 461.

6. *Instructions—Courts—Expression of Opinion—Appeal and Error—Harmless Error—Statutes.*—Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. C. S., 564. *S. v. Jones*, 546.

INSULT. See Carriers of Passengers, 7.

INSURANCE, FIRE.

Insurance, Fire—Policy—Stipulations—Actions—Period of Limitation by Contract—Waiver.—Under the valid provision of a standard fire insurance policy, approved by statute, the period limited to twelve months from the time of loss by fire in which an action may be maintained is not waived by the time taken under an agreement for an appraisal and award for the damages sustained by the insured. *Tatham v. Ins. Co.*, 434.

INSURANCE, LIFE.

1. *Insurance, Life—Principal and Agent—Fraud—Premiums—Misrepresentations—Evidence.*—Evidence that the agent of the insurer, after urging the insured to pay his premium on his life insurance policy soon to become due, and not let it lapse, is informed by the insured that he doubted that he could keep the policy in force, as he had developed a case of tuberculosis, and thereupon the agent misrepresented to the insured that the policy had already lapsed upon his taking up a policy loan that had been made to him, and the insurer would receive no more payments of premiums, which in ignorance the insured believed, and did not then resist on account of his physical condition and resulting depression, but afterwards brought suit for reinstating the policy, and he had always been able, ready, and willing to pay the premiums: *Held*, sufficient on the question of actionable fraud to sustain a verdict in favor of the beneficiaries of the policy obtained after the death of the insured. *Combs v. Ins. Co.*, 218.

2. *Insurance, Life—Principal and Agent—Fraud—Ratification.*—Where the insurer retains the rights or benefits of cancellation of a life insurance policy procured by the fraud of its agent, it may not retain the benefits thus received and repudiate it, for such would be a ratification thereof, whether expressly or impliedly authorized by it or not. *Ibid.*

3. *Insurance, Life—Policies—Contracts—Suicide—Evidence—Questions for Jury—Trials.*—Upon the defense of suicide in an action to recover upon a policy of life insurance, evidence tending to show that the insured was a nervous, irritable, and high-tempered man; that a few minutes before he had finished eating dinner with his family and had gone into an adjoining room, and that his wife, upon hearing a noise, had gone into this room, and found her husband lying on the floor

INSURANCE, LIFE—*Continued.*

with a pistol wound, from his own pistol, evidently taken by him from the shelf of a book case in this room, where he kept it, fired from very close range into his temple, is sufficient to go to the jury upon the question of whether the defendant had intentionally taken his own life. *Alston v. Williams*, 478.

4. *Insurance, Life—Days of Grace—Premiums—Payment.*—Where, by the terms of a policy of life insurance, thirty days grace is allowed the insured for the payment of the premiums from the dates therein specified, the death of the insured within the days of grace, without having paid his last premium, does not relieve the insurer from its liability under the contract of insurance. *Newman v. Ins. Co.*, 485.

5. *Insurance, Life — Conditions — Acceptance of Premiums— Waiver.*—Where the insured afterwards engaged in a hazardous occupation forbidden by the policy unless upon notification given to a certain of its agents and the payment of an additional premium, and it appears that the agent had been notified of such change and the insured continued the policy in force upon the continued payment of the same premiums, the company itself waives the condition imposed by accepting the premiums, with notice, and may not declare the policy invalid and refuse to pay it upon the death of the insured. *Hart v. Woodman*, 488.

6. *Same—Principal and Agent.*—It is not an alteration of the conditions expressed in a policy of life insurance by an officer or agent thereof when the company itself knowingly receives the premiums until the death of the insured, without objection until then, and thus waives the condition. *Ibid.*

7. *Same—Notice.*—Where the insured has notified the agent of the insurer designated by its constitution and by-laws of a change to more hazardous occupation, it is sufficient. *Ibid.*

INTENT. See Deeds and Conveyances, 7, 8; Gifts, 2, 3, 7; Criminal Law, 2, 14; Homicide, 7, 8.

INTEREST. See Evidence, 7; Wills, 11.

INTERPLEADER. See Intoxicating Liquors, 19.

INTERPRETER. See Courts, 15.

INTERSTATE COMMERCE. See Railroads, 14.

INTOXICATING LIQUORS. See Criminal Law, 7; Statutes, 11.

1. *Intoxicating Liquors—Spirituous Liquors—Statutes—Constitutional Law —Federal Constitution—Federal Statutes.*—A State statute in furtherance of, and not in conflict with, the Federal Prohibition Law, may be declared a valid exercise of the police power of the State, expressly sanctioned by the Eighteenth Amendment to the Constitution of the United States. *S. v. Muse*, 506.

2. *Intoxicating Liquors—Criminal Law—Possession—Prima Facie Evidence—Questions for Jury.*—The unlawful purpose of sale of spirituous liquors is the offense made indictable by our statutes, whether the indictment be under C. S., 3385 or 3386, and not the possession

INTOXICATING LIQUORS—*Continued.*

thereof for lawful purposes, though the possession of the specified quantities is *prima facie* evidence of the illegal purpose. and does not establish a *prima facie* case of guilt. C. S., 3379. *S. v. Helms,* 566.

3. *Same—Burden of Proof—Instructions—Appeal and Error—Trials.*—The possession of the specified quantity of spirituous liquor sufficient to make out *prima facie* evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. *Ibid.*

4. *Same—Verdict Directing.*—Where the possession of the specified quantities of intoxicating liquors under our statute, C. S., 3385, has made out *prima facie* evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. *Ibid.*

5. *Intoxicating Liquors—Possession—Prima Facie Evidence—Volstead Act —Statutes—Federal Statutes.*—The Volstead Act, title 2, sec. 25, has no application to an action in the State court wherein the possession of specified quantities of intoxicating liquors under our statutes, C. S., 3385, 3386, makes out *prima facie* evidence of guilt, and an instruction that it made a *prima facie* case sufficient to place the burden on the defendant to establish his innocence is reversible error. *Ibid.*

6. *Intoxicating Liquor—Principal and Agent—Accessories—Misdemeanors.* In the commission of a misdemeanor, both the principal and the agent through whom the offense was committed are held to the same degree of guilt, both being regarded as principals therein for the purpose of conviction. *S. v. Parris,* 585.

7. *Same—Evidence—Defendant's Identity—Instructions.*—Where there is sufficient evidence to convict the defendant of the unlawful sale of spirituous liquor, and also to establish his defense of an alibi, with further evidence of the unlawful and customary sale at his residence by one who resembled him, an instruction by the court to the jury is not erroneous, that if the State had satisfied them beyond a reasonable doubt that the defendant had put liquor there for the purpose of selling it, and some one else was selling it with his consent and authority, the defendant would be guilty. *Ibid.*

8. *Intoxicating Liquors—Verdict—Polling Jurors—Appeal and Error.*—*Semble,* under the facts of this case, upon a trial of defendant for unlawfully selling intoxicating liquors, there being evidence that the defendant made the sale himself, or through another acting for him, the verdict of the jury of guilty makes it doubtful as to which fact was found by them, that could have been ascertained by polling the jury and obviated the necessity of the appeal. *Ibid.*

9. *Intoxicating Liquors—Spirituous Liquors—Instructions.*—Where there is direct evidence of the unlawful sale of spirituous liquors by the defendant, or his keeping it for sale, under indictment therefor an instruction for the jury to find him guilty if they were so satisfied beyond a reasonable doubt is not erroneous. *S. v. Pearson,* 588.

INTOXICATING LIQUORS—*Continued.*

10. *Intoxicating Liquor—Statutes—Interpretation—Amendments—Exceptions—Flavoring Extracts.*—Our statute, C. S., ch. 66, dealing with the subject of prohibition, provides by art. 2, sec. 3373, an amendment theretofore enacted in 1911, that it is unlawful to sell or dispose of intoxicating liquors for gain, "except as hereinafter provided," followed in sec. 3375 with the proviso, excepting "flavoring extracts when sold as such": *Held*, by express terms of the statute, the amendment of 1911, placed in art. 2 of C. S., ch. 66, "flavoring extracts when sold as such" were excluded from the operation of the general law; and any other interpretation would leave the language of the exception altogether without meaning and contravene the manifest purpose of the Legislature. *S. v. Barksdale*, 621.

11. *Same—Defense—Burden of Proof.*—Where the State satisfies the jury beyond a reasonable doubt that the defendant has violated C. S., 3369, by selling or offering for sale intoxicating liquors, or those containing alcohol sufficient to make men drunk, the defendant so indicted must be convicted under the provisions of our prohibition law, C. S., ch. 66, unless he has satisfied the jury with his evidence that the liquids he has sold or offered for sale were in fact and truth flavoring extracts and sold or offered for sale as such. *Ibid.*

12. *Same—Instructions—Appeal and Error.*—Where the evidence offered by the State is sufficient to convict the defendant under the provisions of C. S., 3369, of selling or offering for sale an intoxicating liquid sufficient to make men drunk, and there is evidence on the defendant's behalf that the liquid was in truth and fact a flavoring extract coming within the exception of C. S., 3373, 3375, and only sold or offered for sale as such, the question of the guilt or innocence of the defendant depends upon the verdict of the jury upon the conflicting evidence, and it is error for the trial judge to direct a verdict of guilty upon the issue, as a matter of law. *Ibid.*

13. *Intoxicating Liquor—Statutes—Unlawful Sales—Flavoring Extracts—Evidence—Permits—Formulas.*—Where there is sufficient evidence on the part of the State to show that the defendant was guilty of offering for sale or selling intoxicating liquor prohibited by C. S., 3369, and also on defendant's behalf that the liquid was a flavoring extract coming within the exception of C. S., 3373, 3375, and only sold or offered for sale as such, it is competent for the defendant to introduce in evidence the permit of the Federal prohibition officer allowing the manufacture of the formula for the extracts the defendant was selling, also the standard as to the use of alcohol in flavoring extracts established by the Agricultural Department, as tending to show his good faith and that the liquid so offered by him was what it purported to be, a flavoring extract, and not sold for a beverage. *Ibid.*

14. *Intoxicating Liquors—Federal Statutes—State Statutes—Conflict of Laws—Courts—Jurisdiction.*—In case of conflict between the Volstead Act, valid under the Eighteenth Amendment to the Constitution of the United States, and a State statute on the subject of prohibition, the Federal statute controls; but where the Federal law goes further than the State statute, and makes indictable an offense not embraced within the provisions of the latter, or where the State

INTOXICATING LIQUORS—*Continued.*

statute excepts such act from its general provisions, so that it is not indictable thereunder, the State court has no jurisdiction of the offense, and a conviction may only be had under an indictment in the United States court. *Ibid.*

15. *Same—Police Powers.*—Our State police regulations, affirmative in terms, must be established by the State Legislature and not otherwise. *Ibid.*

16. *Intoxicating Liquors—Federal Statutes—State Statutes.*—The Volstead Act, sec. 4, recognizes and provides for the lawful sale of flavoring extracts, when they are unfit for use as a beverage or for intoxicating beverage purposes, and is not in conflict with C. S., 3373, 3375, when such extracts are unfit for drinking purposes. *Ibid.*

17. *Intoxicating Liquors—Statutes—Exceptions—"Imitation Extracts"—Evidence.*—Where an agent is indicted for violating our State prohibition law, C. S., 3369, and there is evidence tending to show that though he had sold flavoring extracts containing 40 per cent alcohol, they came within the exception of C. S., 3373, 3375, the mere fact that the bottles containing it are labeled "imitation extracts" does not preclude him from establishing his innocence by showing that the word "imitation" had reference alone to the flavor they were endeavoring and intending to produce. *Ibid.*

18. *Intoxicating Liquors—Automobiles—Forfeiture—Ownership.*—The principle requiring a strict construction of a statute creating a forfeiture or in derogation of a common-law right applies to C. S., 3304, requiring a seizure and sale of the defendant's right, title, or interest in an automobile unlawfully used in liquor traffic, and such seizure may not be extended by implication to apply to the seizure of an automobile, owned exclusively by some person other than the defendant, and who is innocent of the offense or complicity therein. *S. v. Johnson,* 638.

19. *Same—Principal and Agent—Interpleader.*—Where the owner of automobiles for hire has instructed his drivers not to use them in connection with the traffic in spirituous liquors and one of them, without his knowledge, has disobeyed the order, the doctrine of *qui fecit per alium,* or *respondeat superior,* does not apply, and he may intervene, where the driver is alone tried and convicted, and regain possession of the automobile and establish his title thereto. C. S., 3304. *Ibid.*

20. *Same—Trials—Constitutional Law.*—Where the driver of an automobile has been indicted for the unlawful use of the owner's automobile in the liquor traffic, and the owner himself establishes his innocence of the offense, upon interpleader, the statute, C. S., 3304, does not deprive him of title to the machine exclusively owned by him, and a conviction would have the effect of condemning him of committing the offense without affording him a trial thereof. *Ibid.*

INVITATION. See Municipal Corporations, 4.

ISSUES. See Libel and Slander, 4; Principal and Agent, 1; Appeal and Error, 8, 24, 33; Verdict, 2; Corporations, 3; Wills, 10.

1. *Issues—Forms—Matters in Controversy—Appeal and Error.*—The form of the issues is a matter largely in the discretion of the trial judge,

ISSUES—*Continued.*

and those submitted by him will be sustained on appeal if they were sufficient to present all matters material to the controversy. *Dalrymple v. Cole*, 285.

2. *Issues—Evidence—Admissions—Statements of Account—Appeal and Error.*—Where the only question presented on the trial is whether the defendant is entitled to recover damages as a deduction from the contract price of lumber sold and delivered to him, it will not be held for error that it was submitted on one issue; and nothing else appearing, it will be presumed, on appeal, that the question was presented under correct instructions from the court, and the issue correctly answered in the verdict. *Lumber Co. v. Elizabeth City*, 442.

JOURNALS. See Constitutional Law, 22.

JUDGE. See Appeal and Error, 10; Courts.

JUDGMENTS. See Appeal and Error, 7, 21, 33, 42, 43; Courts, 14; Verdict, 2; Pleadings, 2; Partition, 1; Process, 1.

1. *Judgments—Default—Laches—Statutes.*—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. C. S., 600. *Guano Co. v. Supply Co.*, 210.

2. *Judgments—Scope of Inquiry.*—An adversary judgment is only the conclusion of law from the facts admitted or established by the verdict, and must be within the scope and purport of the facts so ascertained and determined; and a judgment that goes further is irregular at least, and may at times be held entirely invalid. *Durham v. Hamilton*, 232.

3. *Same—Nuisance—Appeal and Error.*—Where entered in the scope of the inquiry and upon properly established facts, a judgment for damages and an order restraining the defendant from maintaining a slaughter-house and connecting hog and cattle pen, as a nuisance affecting plaintiff's property, is a proper one; but where the judgment goes further and uses the additional words, "or otherwise," such words may be construed and operate to prevent the defendant from using his property in a manner entirely proper and harmless to plaintiff, and will be ordered stricken out on appeal. *Ibid.*

4. *Judgments—Estoppel—Matters Concluded.*—A judgment estops between the same parties, concerning the same lands in controversy, when the nature of the claims is the same as to title, involving the equity of removing a cloud therefrom as to all claims of easements, not only as to all questions actually litigated, but as to all that were determined or necessarily involved in the decision of the former action. *Barker v. Ins. Co.*, 268.

5. *Judgments—Counties—Title—Public Squares—Easements—Estoppel.*—Where a county has brought suit to remove the cloud from the title to its public square, including all claim of easement therein by

JUDGMENTS—*Continued.*

abutting owners, one of such owners, the plaintiff in the present action and a party in the former one, is estopped by the judgment rendered in the county's favor in the former suit from setting up a counterclaim for damages arising from the taking of such easement by the subsequent grantee of the county, which has acquired title to the entire square by the deed of the county. *Ibid.*

6. *Judgments—Pleadings—Lis Pendens—Estoppel.*—The pleadings filed in a suit to enforce specific performance of the vendor's contract to convey lands, describing the lands, has the effect of "*lis pendens*" on a subsequent purchaser giving him constructive notice at least: and thereupon he should intervene and assert whatever title he may claim, or he will be concluded by the judgment. *Dalrymple v. Cole*, 285.

7. *Same—Supreme Court—Decisions in Other Actions.*—Where a purchaser of lands is affected with notice of "*lis pendens*" in a suit brought to recover the lands, he is estopped by the judgment therein. The principle announced in *Mayho v. Cotton*, 69 N. C., 289, is not called in question under the facts in the case at bar. *Ibid.*

8. *Judgments — Estoppel — Counties — Deeds and Conveyances — Public Squares—Adjoining Owners—Easements.*—Where the right of the county to sell its entire courthouse square, free from any claim of easement by adjoining owners of land, has been put in issue and decided in the county's favor, and the judgment affirmed on appeal, the decision is conclusive between the same parties; nor is the question affected by the fact that the contract of the county to sell in the former action reserved unsold a strip alongside of the property of the adjoining owners, and the appeal in the present action is based upon a deed between the same parties to the same land for an additional consideration, without reserving such strip in the conveyance. *Guilford Co. v. Ins. Co.*, 288.

JURISDICTION. See Courts, 1, 4, 5, 7, 8, 10, 11, 12, 13, 16, 19, 20, 23, 25; Criminal Law, 17; Intoxicating Liquors, 14.

JURY. See Evidence, 9; Courts, 18; Intoxicating Liquors, 8.

1. *Jury—Evidence—Jury Room—Documents, etc.—Trials.*—The jury must determine the cause before them on the evidence as it is heard by them or as presented in open court, unless by consent and in certain restricted instances allowed by statute, and, as a matter of right of a party, the jury is not allowed to take with them documentary or other written evidence for their private inspection. *S. v. Caldwell*, 520.

2. *Jury— Verdict— Evidence—Compromise—Personal Consideration.*—Jurors on a trial for a criminal offense are required to form their opinion of the guilt or innocence of the defendant from the evidence, and it is gross wrong in them to agree to the verdict rendered, with a recommendation for mercy, based upon consideration of personal inconvenience, and thus compromise with the other jurors. *S. v. Hall*, 527.

JUSTICES OF THE PEACE. See Courts, 5, 7, 8, 11, 12, 14, 16, 19, 23; Process, 1.

JUVENILE COURTS. See Statutes, 7; Courts.

LACHES. See Equity, 1; Judgments, 1.

LARCENY. See Criminal Law, 11, 12.

LAW. See Appeal and Error, 9.

LEASES. See Constitutional Law, 2; Deeds and Conveyances, 21.

LEGAL TENDER. See Municipal Corporations, 3, 4.

LEGISLATURE. See Criminal Law, 6; Constitutional Law, 32.

LETTERS. See Wills, 5, 8.

LIBEL AND SLANDER.

1. *Libel and Slander—Publication—Facts Constituting Slander.*—To constitute a libel it is not necessary that the publication should impute the commission of a crime, infamous or otherwise, but the charge is sufficient when a false publication is made, holding one up to public hatred, obloquy, contempt, or ridicule reasonably calculated to injure him in his business, etc., without the necessity of averment of special damages; and the charge may be sustained by a false publication calculated to injure one in his trade, business, or profession, by imputing to him fraud, indirect dealing, or incapacity, in reference to the same. *Paul v. Auction Co.*, 1.

2. *Same—Pleadings—Admissions—Demurrer—Matters of Defense—Trials—Questions for Jury.*—By contract the two defendants agreed to sell at auction the lands of customers the plaintiff should procure, upon a division of the profits. Accordingly, and at the instance of one of the defendants, the plaintiff advertised, to procure customers, in a daily newspaper published and circulating in that locality, to which the other defendant published in the following issue of the paper, a denial of any such arrangement, or that he had any knowledge thereof, and "warned" the public that he would not be bound by any selling arrangements made by them with the plaintiff, etc., and this with full knowledge of the contract and against the protest of the plaintiff that it would do him serious damage in his business and prospects: *Held*, defendant's publication was libelous without averment of special damages. *Ibid.*

3. *Libel and Slander—Notice—Damages—Statutes—Newspapers.*—As to whether C. S., 2429, *et seq.*, as to notice to defendant in an action for libel, looking to a retraction and apology, applies to individuals having no connection with a newspaper publishing the libel, *Query? Held*, the statutes having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." *Ibid.*

4. *Libel and Slander—Pleadings—Admissions—Issues—Waiver.*—*Held*, in this action to recover damages for slander, the defendant's failure to answer was not waived by the submission of an issue without objection as to whether the publication was wrongful and unlawful, and made after the plaintiff's request not to publish it, but it was for the jury to determine whether in addition to the admissions of a cause of action growing out of defendant's failure to answer, the tort so admitted was willful and without just cause or excuse. *Ibid.*

LIBEL AND SLANDER—*Continued.*

5. *Libel and Slander—Slander—Damages—Punitive Damages.*—In an action of slander the jury may award, in its discretion, punitive damages upon evidence tending to show that the defendant's conduct had been malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. *Cotton v. Fisheries Co.*, 151.

6. *Same—Actionable Per Se.*—Where the employer is liable in an action of slander for the words uttered or spoken by his employee, such words, when amounting to a charge of larceny, are actionable *per se. Ibid.*

7. *Same—Public Policy—Evidence—Measure of Damages.*—Punitive damages allowable in the sound discretion of the jury, in an action of slander, are on the ground of public policy, for example's sake, not because of the plaintiff's right to the money, except that it is assessed in his suit, and while the amount may not be in excessive disproportion to the circumstances of contumely and indignity present in each particular case, it will not *per se* be reduced, because as a result the plaintiff's character and standing in the community has not thereby been impaired. *Ibid.*

LICENSE. See Taxation, 1, 3, 4; Constitutional Law, 18.

LIENS. See Taxation, 4.

LIGHTS. See Railroads, 4.

LIMITATIONS. See Insurance, Fire, 1.

LIMITATION OF ACTIONS. See Deeds and Conveyances, 14, 23; Equity, 1; Nuisance, 1; Criminal Law, 16.

1. *Limitation of Actions—Pleadings—Appeal and Error.*—In an action against the administrator of the deceased where there are two separate causes of action set out, one to recover the value of services rendered the intestate by the plaintiff, and the other to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations as to the second cause of action in order to avail himself of it as a bar to the plaintiff's recovery thereon. *Smith v. Allen*, 56.

2. *Limitation of Actions—Contracts—Wills.*—The statute of limitations does not begin to run until the death of the intestate on his contract with the plaintiff, that if plaintiff performed certain services for him during his life he would compensate him therefor in his will. *Ibid.*

3. *Limitation of Actions—Deeds and Conveyances—Color of Title—Coverture—Statutes.*—In this suit to cancel the deeds to the *locus in quo*, because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color: *Held*, the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant's title. C. S., 408. *Butler v. Bell*, 86.

4. *Limitation of Actions—Deeds and Conveyances—Estates for Life—Infants.*—The statute of limitations will not ordinarily begin to run against the remainderman until the falling in of the life estate, or until he becomes of legal age. *Roe v. Journigan*, 180.

LIMITATION OF ACTIONS—*Continued.*

5. *Limitation of Actions—Adverse Possession—Ouster—Notice.*—The use and occupation of land is not alone sufficient to confer title on the occupant, the presumption being that the title is in the true owner; and the statute will only ripen the title of the occupant when it has been adverse for the statutory period; that is, open, continuous, notorious, and hostile to the true owner, and evidenced by such unequivocal acts as will put the true owner on notice of the claim. *Clendenin v. Clendenin*, 465.

6. *Same—Relationship of Parties—Parent and Child.*—The husband moved with his wife upon the lands of her mother, and continued thereon with her and their children to the death of his mother-in-law and of his wife, who inherited from her, cultivating the land, without giving clear, definite, or unequivocal notice of his intention to exert exclusive ownership: *Held*, the character of the husband's possession was affected by the relationship of the parties, and this possession was subordinate to the superior title, inherited by his children from their mother, and could not ripen a perfect title in him. *Ibid.*

7. *Limitation of Actions—Adverse Possession—Color of Title.*—The question of color of title to lands does not arise when the character of the possession of the claimant is not sufficient to ripen a perfect title in him. *Ibid.*

LIS PENDENS. See Judgments, 6, 7.

LOSS OF SERVICES. See Abduction, 1.

LUMBER. See Contracts, 7.

MAILS. See Government, 1.

MANDAMUS. See Statutes, 2.

MAPS. See Easements, 2, 4; Deeds and Conveyances, 27.

MARRIAGE LICENSE. See Register of Deeds, 1.

MARRIED WOMEN. See Deeds and Conveyances, 31.

MASTER AND SERVANT. See Employer and Employee, 1, 2.

MENTAL ANGUISH. See Abduction, 1.

MENTAL INCAPACITY. See Deeds and Conveyances, 12, 16, 17, 18, 19.

MERGER. See Deeds and Conveyances, 11; Equity, 1; Contracts, 10.

MINORS. See Courts, 25.

MISDEMEANORS. See Criminal Law; Courts, 22; Intoxicating Liquors, 6.

MISTAKE. See Contracts, 9; Actions, 7.

MOBS. See Trials, 1.

MORTGAGES. See Courts, 6; Taxation, 4.

Mortgages—Deeds in Trust—Sales—Foreclosure—Statutes.—Where a trust deed to secure money loaned on lands has been foreclosed, C. S., 2591, requires the sale be kept open for ten days for the tender of increased

MORTGAGES—*Continued.*

bids, etc., but on the facts of this appeal it appears that an irregularity in conveying the land before the expiration of the statutory time could not have prejudiced any of the parties, and, also, that they are concluded by the judgment upholding the validity of the transaction. ***Wise v. Short*, 320.**

MOTIONS. See Pleadings, 2; Appeal and Error, 7; Process, 1; Trials, 4.

Motions—Nonsuit—Evidence.—Upon a motion as of nonsuit upon the evidence, the court will not pass upon conflicting evidence, and the inquiry will be to its sufficiency to warrant a verdict for the plaintiff, taken in the light most favorable to him. *Loggins v. Utilities Co.*, 222.

MOTIVE. See Evidence, 1.

MUNICIPAL CORPORATIONS. See Actions, 8; Constitutional Law, 15; Taxation, 2.

1. *Municipal Corporations—Cities and Towns—Water-works—Business Enterprises—Torts—Damages.*—The ownership and operation of a system by a city, charging its consumers for water it furnishes them, is in the nature of a business enterprise and not an act done in the exercise of governmental functions or police powers, as to which the city would not be liable for the negligence or torts of its agents or employees, unless under statutory provision to that effect. *Munick v. Durham*, 188.

2. *Same—Principal and Agent—Assault.*—Where a city is engaged in supplying water to its citizens for pay, it is responsible in damages for an unjustifiable assault on one of its customers, while properly on its premises paying his water bill, by its superintendent. *Ibid.*

3. *Same—Legal Tender—Assault.*—The superintendent of the water-works of a city unjustifiably assaulted a customer after he had paid to another and proper employee the amount of his water bill, because he had paid a certain amount thereof in coppers, and had refused to take them from the floor where the superintendent had insultingly thrown them and pay in money in larger denominations: *Held*, the city was responsible in damages notwithstanding the sum paid in coppers was in excess of legal tender of money in that denomination. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Premises—Invitation—Legal Tender.*—Where a customer of a city goes into the office it has provided to pay his water bill, it is upon the implied invitation of the city, and it is required to afford him reasonable protection from its own employees and others thereon. *Ibid.*

5. *Municipal Corporations—Bonds—Maturity of Bonds—Statutes—Notice—Contracts.*—A purchaser of municipal bonds, having a definite time fixed for their maturity, purchases with notice of the provisions of a statute authorizing their issuance, permitting the obligor to pay thereon within five years, or create a sinking fund, and he is bound by his contract: *Semble*, this question is only academic. *Comrs. v. Bank*, 348.

MUNICIPAL CORPORATIONS—*Continued.*

6. *Municipal Corporations—Cities and Towns—Managing Boards—Waterworks—Principal and Agent.*—Where a city owns and controls its water-works system under the special management of a board of water commissioners, this last is an official departmental board, created as a part of the city government for the more convenient and efficient ordering of the water-works and supply, and their action on matters in the line of their official duties and within the scope of their powers is the action of the city, and suits and demands on the part of individuals growing out of their management as a board are to be regarded and dealt with as suits against the city. *Mark v. Charlotte,* 383.

7. *Same—Actions—Governmental Functions.*—A municipality may not be held liable at the suit of individuals for injuries caused by its officials when in the exercise of governmental functions and matters affecting only the public interests, unless such liability is expressly recognized and provided for by statute. *Ibid.*

8. *Same—Fires.*—A municipality, under the common law, is only to be regarded as exercising governmental powers in providing a water supply for the purpose of fire protection, and may not be held liable in damages to its citizen for failure to have supplied an adequacy of water to extinguish the flames on his burning house, though it supplies water for the individual use of its citizens for pay. *Munick v. Durham, ante,* 188, cited and distinguished. *Ibid.*

9. *Same—Statutes—Constitutional Law.*—The common-law principle upon which a city may not be held liable for its failure to supply sufficient water for extinguishing fires is now set at rest by our valid statute. C. S., 2807. *Ibid.*

MUNICIPALITIES. See Constitutional Law, 9, 25.

MURDER. See Homicide.

NEGLIGENCE. See Automobiles, 1, 3, 4, 5, 7; Evidence, 4, 5, 13; Railroads, 2, 3, 5, 6, 7, 8, 9, 10, 13, 14, 16; Carriers of Freight, 4, 8; Appeal and Error, 15, 22; Principal and Agent, 4; Street Railways, 1; Employer and Employee, 1, 2; Carriers of Passengers, 7; Criminal Negligence.

1. *Negligence—Contributory Negligence—Burden of Proof.*—Where contributory negligence is relied upon, the burden is on the defendant to show it. *Jackson v. R. R.,* 153.

2. *Negligence—Principal and Agent—Parent and Child—Automobiles.*—A parent is liable for damages caused by the negligent driving of his automobile by his minor son, when the automobile is maintained for the pleasure and convenience of his family, and at the time in question the son was using it for that purpose, under his express or implied authority. *Burris v. Litaker,* 376.

3. *Negligence—Act of God—Waters—Floods—Dams—Contributing Cause.* Where there is evidence tending to show that a lower proprietor on a stream has caused damages to his property by the breaking of the defendant's dam through his negligence, and, *per contra,* that it was caused by an unprecedented fall of rain in that locality, not to have

NEGLIGENCE—*Continued.*

been reasonably anticipated, the question of the defendant's liability is not whether the negligence of the defendant alone, without the aid of the flood, was insufficient to have caused the break in the dam and the resultant damage, but whether it contributed as a factor in producing it. *Comrs. v. Jennings*, 393.

4. *Same—Concurrent Negligence—Proximate Cause.*—Where the act of God would not have produced damage to the plaintiff's property except for the concurrent negligence of the defendant, this negligence is considered as the proximate cause of the injury, which will hold the defendant liable for the damages sustained. *Ibid.*

5. *Negligence—Ordinary Care—Rule of the Prudent Man—Distinctions.*—The law as to what constitutes negligence is but the want of ordinary care, which is that degree of care that a man of ordinary prudence would use under the same or similar circumstances, the care in the particular case being proportionate to the danger, and not requiring that any particularizing distinction be drawn between its various degrees, or between negligence and gross negligence, in the instruction of the court. *Ibid.*

NEGOTIABLE INSTRUMENTS.

Negotiable Instruments—Endorsement—Independent Contracts—Gaming—Holder in Due Course—Statutes.—The endorsement on a promissory note, negotiable under our statutes, is a new and independent contract, whereby the endorser for value and in due course, among other things, guarantees under C. S., 3047, that he was a holder in due course at the time of the endorsement, and that the obligation is valid and subsisting; and the endorsee may maintain his action thereon against the endorser independently of whether the note was originally given for a gambling debt made void by C. S., 2142. *Bank v. Crafton*, 404.

NEGOTIATIONS. See Contracts, 10.

NET PROFITS. See Contracts, 21.

NEWSPAPERS. See Libel and Slander, 3.

NEW TRIALS. See Trials; Appeal and Error.

NEXT OF KIN. See Estates, 6.

NONRESIDENTS. See Courts, 1.

NONSUIT. See Trials, 4; Corporations, 2; Automobiles, 7; Motions, 1; Register of Deeds, 1; Street Railways, 4; Evidence, 15, 18, 19, 20; Appeal and Error, 32; Criminal Law, 14, 15.

NOTICE. See Libel and Slander; 3; Deeds and Conveyances, 15, 21, 24; Carriers of Freight, 4; Process, 2; Easements, 5; Constitutional Law, 14; Elections, 3; Municipal Corporations, 5; Insurance, Life, 7; Limitation of Actions, 5.

NUDUM PACTUM. See Gifts, 4.

NUISANCE. See Judgments, 3.

1. *Nuisance—Limitation of Actions—Evidence—Measure of Damages.*—Where there is evidence tending to show that the defendant for the past fifteen years has thrown or emptied into a branch running by the plaintiff's, raw sewage, slops, garbage, and thus has maintained a nuisance to his damage, it is not error for the trial judge to permit the plaintiff to show the existence of these conditions more than three years next before the commencement of the action, when this statute has been pleaded, when the evidence is confined solely to the question of defendant's liability. As to whether the evidence is competent upon the measure of damages is not presented or decided. *Morrow v. Mills*, 423.

2. *Nuisance—Private Ownership—Damages—Rights of Defendant—Permanent Damages.*—In an action for damages for the commission and maintenance of a private nuisance, the defendant is not entitled, as a matter of right, to have permanent damages assessed, without the consent of the plaintiff, when he has not sought to recover them in his action. *Webb v. Chemical Co.*, 170 N. C., 662, cited and approved. *Ibid.*

OBJECTIONS AND EXCEPTIONS. See Evidence, 1, 2; Appeal and Error, 16, 22, 25, 26, 30, 31, 34, 40, 41, 44, 46, 47, 51.

OBSTRUCTIONS. See Railroads, 11.

OFFENSES. See Criminal Law, 4, 6; Pleadings, 5.

OFFSET. See Betterments, 4.

OMISSIONS. See Indictment, 1.

OPINION. See Instruction, 3, 6; Evidence, 8, 9, 10.

ORDINANCES. See Evidence, 5.

OUSTER. See Limitation of Actions, 5.

OWNERSHIP. See Intoxicating Liquors, 18.

PARCEL POST. See Government, 1; Principal and Agent, 6.

PARENT AND CHILD. See Appeal and Error, 15; Negligence, 2; Abduction, 1; Limitation of Actions, 6.

PARTIES. See Railroads, 1; Removal of Causes, 3; Actions, 2; Process, 2; Appeal and Error, 26, 29; Limitation of Actions, 46.

PARTITION.

Partition—Title—Judgment—Estoppel.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. *Baugham v. Trust Co.*, 406.

PASSENGERS. See Automobiles, 1, 3, 4, 6; Carriers of Passengers, 3, 6.

PAYMENT. See Deeds and Conveyances, 1; Contracts, 9; Taxation, 3; Insurance, Life, 4.

PENALTY. See Register of Deeds, 1.

PERFORMANCES. See Vendor and Purchaser, 2; Contracts, 8.

PERMITS. See Intoxicating Liquors, 13.

PERSONALTY. See Wills, 4.

PER CAPITA. See Wills, 19.

PER STIRPES. See Wills, 19.

PETITION. See Appeal and Error, 4; Removal of Causes, 1.

PETITIONERS. See Drainage Districts, 1.

PLATS. See Easements, 2.

PLEADINGS. See Libel and Slander, 2, 4; Limitation of Actions, 1; Actions, 2, 5; Courts, 2; Judgments, 6; Removal of Causes, 6.

1. *Pleadings— Answers— Admissions— Instructions—Appeal and Error—Requests for Instructions.*—In an action for libel, where the defendant has filed no answer, an instruction of the trial judge that the plaintiff must satisfy the jury as to the amount of damages, and that the allegations of the libelous matter must be taken as true against the defendant is not error (C. S., 543), and *Held* in this case, while the charge is somewhat general on the issue of damages, it will not be held for reversible error on the record, and the absence of defendant's prayer to make it more specific. *Paul v. Auction Co.*, 2.

2. *Pleadings — Motions — Judgments— Demurrer.*—Plaintiff's motion for judgment on the pleadings is in effect a demurrer to the answer, admitting the allegations of fact therein, but denying their legal sufficiency to constitute a defense. *Churchwell v. Trust Co.*, 21.

3. *Same—Defenses—Evidence—Questions for Jury.*—Where the plaintiff alleges that his intestate deposited a certain sum of money in defendant's bank, and the amount is claimed by the administrator of the mother of the deceased by allegation in his answer that the plaintiff's intestate had given this deposit to his mother before his death, the codefendant bank, alleging that the account had been transferred to the mother on its books and a new certificate of deposit issued to her, after intestate's death, in accordance with an expressed desire of the intestate that she should have it, the bank agreeing to pay the money as the court should direct: *Held*, an admission that the deposit had been made and not drawn out by the depositor is insufficient to entitle the plaintiff to judgment on the pleadings in his favor; but that the issues made by the answer should be tried, the burden being upon the defendant to show to the jury the truth of their allegations by evidence, and therefore it was error for the trial judge to render a judgment on the pleadings in the defendant's favor. *Ibid.*

4. *Pleadings—Criminal Law—Statutes—Amendments.*—On appeal from a court of a justice of the peace, the Superior Court judge may, under our statute, C. S., 1500, Rule 12, liberally allow amendments in his discretion, to the substance of a criminal complaint, as well as to the form, when so doing does not change the character of the offense originally charged. *S. v. Mills*, 531.

PLEADINGS—*Continued.*

5. *Same—Separate Counts—Same Offense.*—Where the defendant has been separately tried before a justice of the peace for the several acts made indictable under C. S., 2618, as to unlawful speeding upon public highways and streets, it is permissible for the Superior Court, on appeal, to allow an amendment to the complaint or warrant so as to make one complaint include the several offenses under different counts. C. S., 4647. *Ibid.*

PLEAS. See Appeal and Error, 45; Criminal Law, 8.

POLICE POWERS. See Sales in Bulk, 1; Constitutional Law, 18; Intoxicating Liquors, 15.

POPULATION. See Constitutional Law, 20.

POWERS. See Vendor and Purchaser, 1; Courts, 15; Constitutional Law, 21.

PREGNANCY. See Criminal Law, 2.

PREMEDITATION. See Homicide, 7.

PREMISES. See Carriers of Passengers, 6: Municipal Corporations, 4.

PRESUMPTIVE RIGHTS. See Counties, 1.

PRESUMPTIONS. See Deeds and Conveyances, 2, 6; Courts, 21; Wills, 2; Principal and Agent, 6; Appeal and Error, 49; Elections, 3; Gifts, 10; Carriers of Freight, 8.

PRIMA FACIE CASE. See Sales in Bulk, 1.

PRIMA FACIE EVIDENCE. See Intoxicating Liquors, 2, 5.

PRINCIPAL AND AGENT. See Carriers of Passengers, 4, 6; Intoxicating Liquors, 6, 19; Corporations, 1; Appeal and Error, 15; Railroads, 1; Removal of Causes, 1; Municipal Corporations, 2, 6; Insurance, Life, 1, 2, 6; Negligence, 2; Contracts, 21; Statute of Frauds, 2.

1. *Principal and Agent— Contracts— Revocation—Evidence—Issues—Appeal and Error.*—A contract of agency for the sale of land for an indefinite and unstated time may be revoked at will by the owner, in the absence of agreement or covenant to the contrary, and in the agent's action to recover damages for the owner's breach, it is reversible error for the judge to refuse to submit an issue thereon, tendered by the plaintiff, when there is evidence thereof. *Real Estate Co. v. Sasser*, 179 N. C., 497, cited as controlling. *Hagood v. Holland*, 64.

2. *Same—Damages.*—Evidence that the agent for the sale of lands has bought the interest of his copartner in the contract of agency, for a certain sum, is incompetent in the agent's action against the owner on the question of damages arising from the exercise by the owner of his right of revocation. *Ibid.*

3. *Principal and Agent—Ratification—Evidence—Questions for Jury.*—While a principal will not be bound by the unauthorized acts of his agent by ratification, assent, or acquiescence therein, without knowledge of the material facts, yet where the fact of agency has been established and the principal benefited, the evidence of ratification

PRINCIPAL AND AGENT—*Continued.*

will be liberally construed, and very slight circumstances may raise the presumption of ratification to take the case to the jury: and the evidence in this case is held sufficient. *Mfg. Co. v. McPhail*, 206.

4. *Principal and Agent—Father and Son—Automobiles—Negligence.*—Where the owner of an automobile has his son to operate it as his chauffeur, both for business purposes and for the comfort and pleasure of his family, and there is evidence that he has given his permission for his son, just over sixteen years of age, to use it in escorting the plaintiff's intestate, a young girl of about the same age, to a dance, it is sufficient upon the question of the fact of the agency of the son that would bind the father for his negligence which proximately caused the death of the intestate when returning from the dance in the automobile. *Tyree v. Tudor*, 214.

5. *Same—Duty of Principal—Selection of Agent.*—Where the father has given permission to his son to use his automobile for the purpose of the son to escort a young girl to a dance, the son being slightly over sixteen, and there is evidence that the son usually acted as the chauffeur of his father for business and social purposes, it was the duty of the father not to entrust the safety of the young girl to his son unless he knew that he was careful and prudent in the operation of the machine, and he is responsible in damages for the death of the girl, proximately caused by his son's recklessness in driving the machine while acting as escort. *Ibid.*

6. *Principal and Agent—Common Carriers—Delivery—Presumptions—U. S. Government—Parcel Post—Consignor and Consignee.*—The principle that makes the consignor the agent of the consignee in delivering a shipment to the common carrier rests upon the liability of the carrier in such instances, and a delivery of a parcel post package to the U. S. Government postoffice by the sender, when not insured, cannot make the Government, which assumes no liability, the agent of the sendee, without instructions from him to the sender to so send the package. *Green v. Vonde Co.*, 317.

7. *Same—Instructions to Ship.*—A laundry company held itself out to the public as obligated to pay the transportation charges for the return of laundry to its customers, upon certain conditions, and received clothes by express, accompanied by a letter instructing it not to return the laundry "C. O. D.": *Held*, equivalent to an instruction to make the return shipment by express, and the laundry company is responsible for the value of the uninsured parcel post package, coming within its provision as to paying the return transportation charges, upon the failure of its delivery. *Ibid.*

8. *Principal and Agent—Contracts—Consignor and Consignee—Carriers—Railroads.*—An agreement by the consignor to prepay the freight on a shipment to its customers *prima facie* constitutes the carrier the consignor's agent. *Ibid.*

PRINTING. See Appeal and Error, 13.

PRIORITY. See Taxation, 14.

PRIVATE OWNERSHIP. See Nuisance, 2.

PRIVY EXAMINATION. See Deeds and Conveyances, 31.

PROBATE. See Constitutional Law, 1; Statutes, 3, 4; Deeds and Conveyances, 31, 32.

PROCESS. See Courts, 1, 4, 14.

1. *Process— Summons— Service—Attachment—Judgment Set Aside—Motions—Justices of the Peace.*—Where a justice's summons has been returned, "defendant not to be found in the county," and misinformation has been given the plaintiff that defendant has left the State, and it appears in the Superior Court on appeal that no process had been served on the defendant; that he was a resident of the State and had not concealed himself to avoid service of summons, etc.: *Held,* a warrant of attachment on the debtor's property situated in the county was properly vacated upon proper motion in the justice's court. *Herndon v. Autry,* 271.
2. *Same—Notice—Parties.*—The knowledge of the defendant that his property was advertised to be sold under a warrant of attachment in the action is not alone sufficient to make him a party to the action so as to conclude him by the judgment, it being required that he should have been, in accordance with the provisions of the statute, made a party thereto by proper service of process. *Ibid.*

PROMISE. See Statute of Frauds, 1.

PROTEST. See Taxation, 2, 3.

PROXIMATE CAUSE. See Railroads, 10; Negligence, 4.

PUBLICATION. See Libel and Slander, 1.

PUBLIC SQUARES. See Counties, 1; Judgments, 5, 8.

PUNISHMENT. See Constitutional Law, 31, 32; Criminal Law, 9.

PUNITIVE DAMAGES. See Libel and Slander, 5; Carriers of Passengers, 4, 7.

PURCHASER. See Deeds and Conveyances, 12, 14; Sales in Bulk, 2, 3; Appeal and Error, 7; Constitutional Law, 14.

QUANTUM MERUIT. See Contracts, 8.

QUESTIONS FOR JURY. See Pleadings, 3; Principal and Agent, 3; Contracts, 1, 3; Intoxicating Liquor, 2; Libel and Slander, 2; Betterments, 2; Carriers of Passengers, 1; Instructions, 2; Railroads, 9, 13; Register of Deeds, 1; Street Railways, 4; Corporations, 3; Appeal and Error, 22; Automobiles, 7; Carriers of Freight, 8; Deeds and Conveyances, 33; Insurance, Life, 3; Street Railways.

QUESTIONS OF LAW. See Evidence, 12; Constitutional Law, 35.

RAILROADS. See Automobiles, 1, 3; Carriers of Passengers, 1, 3, 6; Evidence, 4; Removal of Causes, 2, 3, 4, 5; Carriers of Freight, 1, 4; Principal and Agent, 8.

1. *Railroads—Federal Control—Federal Agent—Director General—Parties—Statutes—War—Principal and Agent.*—Under the Federal statute, actions at law that would lie against a common carrier before the United States assumed control of them would also lie after the act restoring them to private control as to injuries accruing during Gov-

RAILROADS—*Continued.*

ernment control against the agent designated by the President, the damages recovered to be paid out of the revolving fund created by the act, and the Director General and the railroads are both proper parties to the action. *Parker v. R. R.*, 95.

2. *Railroads—Crossings—Signals—Warnings—Negligence.*—Evidence that the plaintiff was injured while attempting to cross the track of the defendant railroad company about a half hour after sunset on a cloudy evening, and in a drizzling rain; that the place of the injury was a most frequented crossing in a town, and that the defendant's train was running backward without light on its advancing end, and without signal or other warning, or a flagman properly placed to give any, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence. *Ibid.*

3. *Railroads— Crossings— Automobiles— Negligence—Evidence—Signals—Warnings.*—The plaintiff was injured while a passenger in an automobile endeavoring to cross defendant railroad company's track on a dark evening about sunset, being struck by defendant's locomotive: *Held,* under the evidence in this case it was for the jury to determine whether the defendant was negligent. *Ibid.*

4. *Same—Lights.*—It is negligence for a railroad company's employees in charge to back its engine over a frequently used street crossing of a town after dusk without a light or other signals or warning, or without placing some one to warn pedestrians of the approach of the train. *Ibid.*

5. *Railroads — Crossings — Negligence — Evidence — Watchmen.* — Where there is evidence tending to show negligence on the part of the railroad company's employees to give timely notice at a frequented crossing of a town of the approach of the defendant's train, which, with the other evidence, was sufficient to be submitted to the jury on the issue of defendant's negligence; it is also competent to show that this employee had been ill for a long time, and was incompetent on account of his physical infirmities. *Ibid.*

6. *Railroads—Automobiles—Public Crossings—Safety of Crossings—Negligence.*—The principle announced in *Tate v. R. R.*, 168 N. C., 523, and *Raper v. R. R.*, 126 N. C., 563, as to the negligence of a railroad company in failing to maintain its track at a public crossing as safe and convenient to the public as it would have been if the railroad had not built across such crossing, approved. *Pusey v. R. R.*, 138.

7. *Railroads—Automobiles—Negligence—Joint Liability.*—An instruction to the jury, under the evidence in this case, making a railroad company and the driver of an automobile liable in damages for an injury proximately caused to a guest in the automobile, by their concurrent negligence, is approved on the principle announced in *Bagwell v. R. R.*, 167 N. C., 616. *Ibid.*

8. *Railroads—Crossings—Contributory Negligence—Instructions—Evidence—Appeal and Error.*—Where there is evidence tending to show that the train of the defendant at a public road crossing negligently ran upon the defendant's automobile as he was attempting to cross the track, the failure of the defendant to come to a full stop before entering

RAILROADS—*Continued.*

upon the right of way will not as a matter of law sustain a peremptory instruction in the affirmative on the issue of contributory negligence, there being evidence tending to show that the plaintiff was not negligent in other respects. *Jackson v. R. R.*, 153.

9. *Railroads — Crossings — Negligence — Signals— Warnings—Evidence—Questions for Jury.*—Where a railroad train collided with an automobile and caused the injury complained of, where both the track and the public road were in a cut of eleven feet approaching each other at an angle so that the approach of the train could not be seen more than eleven feet from the track, and there is evidence tending to show that the train, at sixty miles an hour, had approached without signal or warning, and without heeding a sign for that purpose placed about two hundred and fifty feet from the place of the collision, it is sufficient to take the case to the jury upon the issue of actionable negligence of the defendant. *Ibid.*

10. *Railroads— Carriers— Electric Carriers—Negligence—Evidence—Proximate Cause—Public Crossings.*—An electric interurban company for freight and passenger service is required, when its cars approach a public crossing, to give such signal as would be reasonably sufficient to warn persons on the public road of the coming of the car, by ringing the bell or blowing the whistle or both, if necessary; and its failure therein will be evidence of negligence, rendering it liable in damages when the proximate cause of a personal injury to a person attempting to cross the track there. *Costin v. Power Co.*, 196.

11. *Same—Obstructions.*—The rule making an electric carrier responsible in damages for an injury caused to one attempting to cross its track at a crossing with a public road, is more insistent where the view of motormen operating the car and also of the person injured was obstructed at the time by a building in the carrier's use and maintained by it on its right of way. *Ibid.*

12. *Same—Apparent Danger.*—It is the duty of the motorman on the car of an electric carrier, in the exercise of ordinary care, to avoid a collision by stopping the car in time, when he sees or should have seen that a vehicle at a public crossing has stopped ahead of it on the track, and his negligence therein renders the carrier liable when it is the proximate cause of the injury. *Ibid.*

13. *Same—Contributory Negligence—Questions for Jury.*—In an action against a carrier for damages for a personal injury sustained at a public crossing in a collision with defendant carrier's electric car, there was evidence tending to show that the defendant's motorman, in the exercise of due care, should have seen the automobile in which the plaintiff was a passenger, projecting beyond its building on its right of way in time to have stopped the car and avoided the injury complained of; that he had been signaled in time by a third person present on the occasion; that the automobile had started a short distance from the track after the plaintiff had unavailingly looked and listened, and though he continued to observe this care the train came suddenly in view from behind the building and struck the car in which he was a passenger: *Held*, the questions of defendant's negligence and the plaintiff's contributory negligence were for the determination of the jury upon appropriate issues. *Ibid.*

RAILROADS—*Continued.*

14. *Railroads—Interstate Commerce—Employer and Employee—Federal Employer's Liability Act—Negligence—Flagmen.*—A flagman upon a freight train engaged in interstate commerce, upon whom alone the duty rested to see that cars placed upon a siding were clear for the passage of the train upon the other track, and then signal the engineer to go ahead, is for the purpose in charge of the train, and where he has been caught between the two trains and killed by the neglect of his duty to see that the cars on the siding were clear of the other train, this negligence is attributable to him and not to the railroad's engineer or other employees, and when the proximate and only cause of the injury, the plaintiff cannot recover damages of the defendant therefor. *Ingram v. R. R.*, 491.

15. *Same—Implements—Safety Appliances—Evidence.*—In an action to recover damages for the killing of the plaintiff's intestate, engaged in interstate commerce, by being caught between the cars on defendant's pass track and the moving train of the defendant on the main track, when it appears that it was the sole duty of the intestate to see that these cars were clear and signal the engineer, his contributory negligence in not having done so is not affected by the fact that certain implements had not been furnished by the defendant for keeping the cars on the pass track from moving, when he knew that such implements had not been furnished, and if they had been, they were unnecessary on account of the grade of the pass track, and when the intestate was experienced and could have safely and reasonably performed his duty under the circumstances. *Ibid.*

16. *Railroads—Federal Employers' Liability Act—Negligence—Employer and Employee.*—An action to recover damages against a railroad company for the negligent killing of the plaintiff's intestate, while engaged in interstate commerce, is controlled by the Federal Employers' Liability Act, and thereunder no recovery can be had when the death was caused solely by the negligent act of the intestate. *Ibid.*

RAPE. See Criminal Law, 14.

RATIFICATION. See Principal and Agent, 3.

REALTY. See Wills, 4.

REBUTTAL. See Government, 1.

RECEIPT. See Carriers of Freight, 1.

RECORDER'S COURT. See Courts.

RECORDS. See Courts, 15, 28; Appeal and Error, 10, 11, 48.

REFERENCE. See Appeal and Error, 19, 36; Evidence, 16.

1. *Reference—Order—Trial by Jury—Waiver.*—The parties to a cause referred reserving the right to a trial by jury waive this right by afterwards agreeing that the trial judge shall find the facts. *Campbell v. Pearce*, 494.

2. *Reference—Order—Scope of Reference—Waiver.*—Where a controversy as to title to lands has been referred and afterwards consolidated

REFERENCE—*Continued.*

with another action involving the same title, objection that the referee acted beyond the power of the first reference is not tenable when it appears that the parties filed specific exceptions to the report and agreed that the trial judge should find all issuable matters, for their action in so doing is a waiver of the right set up. *Ibid.*

REGISTER OF DEEDS.

Register of Deeds—Marriage License—Statutes—Penalty—Evidence—Nonsuit—Questions for Jury.—In an action to recover of the register of deeds of a county the penalties allowed by C. S., 2500, 2503, for issuing a license for the marriage of a female under eighteen years of age, and the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. *Lemmons v. Sigman*, 238.

REGISTRATION. See Deeds and Conveyances, 21; Easements, 5.

REHEARING. See Appeal and Error, 4.

RELATIONSHIP. See Estates, 6; Limitation of Actions, 6.

RELINQUISHMENT. See Wills, 14, 15.

REMAINDERS. See WILLS, 10, 12, 15.

REMAND. See Appeal and Error, 12.

REMEDIES. See Sales in Bulk, 2.

REMOVAL OF CAUSES. See Courts, 24.

1. *Removal of Causes—Petition—Verification—Principal and Agent.*—*Semble*, an attorney with authority to sign bonds and other instruments required in courts and other legal proceedings, without further authority to verify pleadings in behalf of his principal, is insufficient to confer authority upon the agent to verify the petition in behalf of the principal to remove a cause to the Federal courts from a State court. *Mizell v. R. R.*, 36.

2. *Removal of Causes—Diversity of Citizenship—Domestic Corporations—Railroads.*—The Atlantic Coast Line Railroad Company is, under the provisions of its charter, a North Carolina corporation, and may not, therefore, remove a cause against it to the Federal court under a petition averring that it is a nonresident of this State, under the Federal Removal Act for diversity of citizenship. *Cox v. A. C. L. R. R. Co.*, 166 N. C., 652, cited and applied. *Ibid.*

3. *Removal of Causes—Railroads—Director General—Parties—Right to Remove—Domestic Corporations.*—Under the Federal act placing the railroads under the Director General of Railroads as a war measure, both the railroad and the Director General, for the purpose of removal of a cause from the State to the Federal court, are one and the same, and properly joined as parties defendant, and the right to remove does not exist where the railroad, seeking it, is not a foreign corporation. *Ibid.*

REMOVAL OF CAUSES—*Continued.*

4. *Removal of Causes—Vested Rights—Constitutional Law—Railroads—War.*—Where an injury, the basis of an action for damages against a railroad company, occurred before the railroads were discharged from Federal control, the right of action vests at that time and is "property" within the meaning of the Constitution, which the statute returning the railroads to private ownership cannot defeat or modify. *Ibid.*

5. *Removal of Causes—Railroads—War—Federal Statutes—Constitutional Law.*—Neither a domestic railroad company nor the Director General of Railroads has the right to remove a cause of action brought by a citizen of North Carolina in the State court for damages for a personal injury, from the State to the Federal courts, under the Constitution and statutes of the United States, on the ground of diversity of citizenship, nor is such right given, but to the contrary, is prohibited, in the transportation act of Congress, approved 21 March, 1918, nor can it be inferred from the fact that the act of Congress of 1920, restoring the railroads to private control, is silent to the removal of causes. *Ibid.*

6. *Removal of Causes—Pleadings—Amendment—Change of Nature of Original Cause.*—Where a cause of action has been brought in the State court and is not then removable to the Federal Court, it may thereafter become so if the pleadings have been changed as to so affect the nature of the original suit as to bring it within the Federal Removal Act. *Public Service Co. v. Power Co.*, 356.

7. *Same—Restraining Order—Injunction.*—The application for a temporary restraining order is merely ancillary, incidental, and auxiliary to the original suit, and where the original suit is not removable under the Federal acts, it does not become so merely because a restraining order has thereafter been applied for and obtained therein. *Ibid.*

RENTS AND PROFITS. See Betterments, 4.

REPLEVY BOND. See Courts, 1.

REPRESENTATION. See Estates, 7.

RES GESTAE. See Evidence, 6; Homicide, 3.

REVERSIBLE ERROR. See Contracts, 19; Appeal and Error.

REVERSION. See Wills, 15.

REVOCATION. See Deeds and Conveyances, 11, 20; Principal and Agent, 1.

RIGHTS. See Nuisance, 2; Wills, 14, 15.

ROADS AND HIGHWAYS. See Statutes, 2; Constitutional Law, 2.

ROAD DISTRICTS. See Constitutional Law, 11, 15.

ROBBERY. See Homicide, 8.

RULE OF PROPERTY. See Courts, 13.

RULE OF PRUDENT MAN. See Negligence.

RULES AND REGULATIONS. See Warehousemen, 4.

RULE IN SHELLEY'S CASE. See Estates, 2.

RESIDUARY CLAUSE. See Wills, 2.

SAFETY. See Railroads, 6.

SAFETY APPLIANCES. See Railroads, 15.

SALARIES. See Sheriffs, 4.

SALES. See Appeal and Error, 7; Mortgages, 1; Intoxicating Liquors, 13; Warehousemen, 1.

SALES IN BULK.

1. *Sales in Bulk—Statutes—Police Powers—Evidence—Prima Facie Case.* C. S., 1013, regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, *prima facie* evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government, and such sale is to be regarded as *prima facie* fraudulent in the trial of an issue as to its validity. *Rubber Co. v. Morris*, 184.

2. *Same—Remedies of Creditors—Bona Fide Purchasers.*—When a sale of merchandise in bulk is avoided for noncompliance with the statute, C. S., 1013, the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchasers as long as the goods can be identified, or until they have passed into the hands of a *bona fide* purchaser for value without notice. *Ibid.*

3. *Same—Identification of Goods—Subsequent Purchasers.*—The sale of merchandise in bulk is without the usual course of business, and affects the purchaser with notice of a defective title for noncompliance with the statute, C. S., 1013, as long as it can be identified and traced to any one to whom it has been transferred otherwise than in good faith and for a valuable consideration. *Ibid.*

4. *Same—Dealers—Repairers—Automobiles.*—Where the dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares, under the doctrine announced in *Swift & Co. v. Tempelos*, 178 N. C., 487, for the sale of the original creditor is itself void for noncompliance with the statute, C. S., 1013. *Ibid.*

SCHOOLS. See Trusts, 4.

SCHOOL DISTRICTS. See Constitutional Law, 8, 27, 28; Trusts, 4.

SCHOOLHOUSES. See Trusts, 8.

SEALS. See Deeds and Conveyances, 6.

SELF-DEFENSE. See Homicide, 1, 4, 5.

SELLER. See Warehousemen, 2.

SENTENCE. See Appeal and Error, 42; Criminal Law, 7, 9.

SERVICE. See Courts, 14; Summons, 1.

SEVERANCE. See Trials, 2.

SHERIFFS.

1. *Sheriffs—Personal Execution—Penal Statutes—Strict Construction.*—The provisions of C. S., 3943, making the sheriff liable for the escape of one taken under personal execution upon a judgment for the payment of a debt, interest, and cost, are highly penal, requiring a strict construction or, at least, one reasonable in determining the sheriff's liability in any given case. *Brady v. Hughes*, 234.

2. *Same—Escape—Absence of Deputy Sheriff.*—The fact that the sheriff's deputy permitted his prisoner to remain in an attorney's office, with door unlocked, while he, the deputy, was away for a few minutes, and that he returned, found the prisoner there, and delivered him to the jailer, as the statute, C. S., 3943, required, is not such an "escape" as will make the sheriff liable for the debt, etc. *Ibid.*

3. *Same—No Damage Shown.*—The fact that the sheriff's deputy permitted his prisoner, arrested for debt under an execution against the person, to remain a few minutes in a room with the prisoner's attorney, from which the deputy sheriff was absent for a part of the time attending to matters connected with the case, and then, soon returning, delivered the prisoner to the jailer as the statute directs, C. S., 3943, where the prisoner remained until discharged in due course of the law, does not show any loss to the plaintiff, and is not such an "escape" as is contemplated by the statute. *Ibid.*

4. *Sheriffs—Fees—Salaries—Duties—Distilleries—Statutes.*—The fees or emoluments incident to a sheriff's office enumerated in Rev., 2777, and extended by ch. 807, Public Laws of 1909, to allowance for the seizure and destruction of illicit distilleries, are excluded by a public-local law applicable to a certain county, subsequently enacted, but prior to the commencement of the term of the incumbent, wherein it is provided that the sheriff shall turn over to the county treasurer all moneys collected from fees, and receive a specified sum as a salary in lieu of his fees, with exception only of certain fees allowed to his township deputy in certain instances, the duty to seize the illicit distilleries being the same as any other required of him as sheriff of the county. *Thompson v. Comrs.*, 265.

SIGNALS. See Railroads, 1, 2, 9.

SIGNATURE. See Wills, 8.

SLANDER. See Libel and Slander.

SPEED LIMITS. See Criminal Negligence.

SPIRITUOUS LIQUORS. See Intoxicating Liquors; Statutes, 11.

STARE DECISIS. See Appeal and Error, 9.

STATE BOARD OF EDUCATION. See Deeds and Conveyances, 5.

STATEMENT. See Appeal and Error, 10, 11; Issues, 2.

STATE'S LAND. See Deeds and Conveyances, 5.

STATE'S LINE. See Constitutional Law, 19, 21; Statutes, 6.

STATUTES. See Constitutional Law, 1, 2, 7, 8, 10, 11, 15, 17, 19, 21, 22, 24, 29, 31, 33, 34; Libel and Slander, 3; Deeds and Conveyances, 2, 10, 20; Drainage Districts, 1, 3; Elections, 2; Appeal and Error, 3, 14; Betterments, 4; Clerks of Court, 1; Limitation of Actions, 3; Judgments, 1; Railroads, 5; Vendor and Purchaser, 1; Actions, 2, 3; Sales in Bulk, 1; Contracts, 15; Courts, 2, 3, 4, 5, 8, 13, 18, 19, 20, 23, 25, 28; Trusts, 5; Mortgages, 1; Register of Deeds, 1; Sheriffs, 1, 4; Municipal Corporations, 5, 9; Taxation, 1; Wills, 11; Negotiable Instruments, 1; Automobiles, 7; Criminal Law, 3, 6, 7, 8, 9, 10, 11; Instructions, 6; Trials, 4; Intoxicating Liquors, 1, 5, 10, 13, 14, 16, 17; Pleadings, 4; Homicide, 8, 10; Taxation, 3; Criminal Negligence.

1. *Statutes—Interpretation—Ambiguity.*—When the language of a statute is unambiguous and the intent is plain, there is no need for its construction by the courts, and it is the duty of the courts to enforce it according to its obvious terms and meaning. *Highway Commission v. Varner*, 42.

2. *Same—Roads and Highways—Road Commissioners—Repealing Statutes—Mandamus.*—Where a statute, as amended, directs the construction and repair of a certain public highway in a township by the directors of the State Prison, to be done in accordance with and under the direction of the Highway Commissioners of the township, and place thereon, not later than a certain date, a certain force of convicts, suitable teams, etc., and thereafter withdraws from the township commissioners of the county the power to construct, maintain, and improve the public roads of the townships, and gives it to the highway commissioners of the county, created by the act, repealing all laws or parts of laws in conflict therewith, including in specific terms "special or local laws authorizing the raising of money for the purpose: *Held*, the former acts are 'local' or 'special,' and their provisions are repealed by the latter act; and an order for a mandamus brought by the county highway commission against the directors of the State Prison to compel them to construct, etc., the road as specified in the former statute, will be denied by the courts. As to whether mandamus was proper remedy, *Quere?*" *Ibid.*

3. *Statutes—Deeds and Conveyances—Defective Probate.*—A deed made prior to the enactment of ch. 204, Laws of 1913, at the special session of the Legislature, is validated by the statute, as against the heirs of the grantor, when the deed is in the defendant's chain of title, and the plaintiff, objecting to its introduction in evidence, claims no right or title thereunder. *Sluder v. Lumber Co.*, 69.

4. *Statutes—Wills—Defective Probate.*—A will probated in another State requiring only the examination of one witness, and there are two

STATUTES—*Continued.*

witnesses thereto, is cured by our statute, ch. 142, Laws 1913 (special session), the same being a defective probate, and not a defect in its execution. *Ibid.*

5. *Statutes — Interpretation — Intent — Rhetoric—Verbal Inaccuracies.*—Where the plain intent and meaning of a statute appear in its language, it will not be affected by rhetorical or verbal inaccuracy. *Long v. Comrs.*, 146.

6. *Statutes — Counties — Bridges — Streams—State Lines—Necessary Expense—Apportionment of Expense—Courts.*—What proportionate part of expense a county should bear in the building of a bridge and its approaches over a stream on the State line, or whether such expenditures were necessary, are matters exclusively for the Legislature, and not for the courts to determine. *Emery v. Comrs.*, 421.

7. *Statutes—Discrepancies—Courts—Juvenile Courts.*—*Semble,* the provision of sec. 3, ch. 97, Public Laws 1919, that the meaning of the word "child" shall be one "less than eighteen years of age," and the term "adult" shall mean any person eighteen years old or over, intended, from the interpretation of the entire chapter, that to come within the provision of the act the child should be a minor under the age of sixteen years, and *Held,* the discrepancy is cured by C. S., 5041. *S. v. Coble*, 554.

8. *Statutes—General Laws—Special Acts—Repeal—Drainage Districts.*—Where a special local statute for the formation and operation of a drainage district is complete in itself in all its details, a general law expressing itself applicable to all such drainage districts in the State, adding further duties and making the failure of the commissioners to file certain reports an indictable offense, C. S., 5374, 5375, will not be construed to apply unless special reference is made to the special local act. *S. v. Gettys*, 580.

9. *Same—Consolidated Statutes.*—The Consolidated Statutes were compiled under authority of ch. 252, Laws 1917, for "collecting and revising the public statutes of the State," and unless specifically referred to, a private local statute, complete in itself, is not affected unless specifically mentioned therein. *Ibid.*

10. *Same.*—Where a public-local law is complete in all of its details in establishing and maintaining a special drainage district, and requires the commissioners to keep "a perfect record of all dealings and transactions," this record is subject to inspection by all interested in the district; and C. S., 5374-5, subsequently enacted, which, among other things, makes it an indictable offense for the failure of the commissioners to make certain reports and to publish them, has no application, especially as C. S., 5381, provides that the subchapter on Drainage Districts "shall not repeal or change local drainage laws already enacted." *Ibid.*

11. *Statutes — Interpretations — Intent— Spirituous Liquors—Intoxicating Liquors.*—The various parts of a statute on the same subject are construed as a whole, to give each and every part effect, if this can be done by any fair and reasonable intendment; and when a literal interpretation of the language will lead to absurd results, or contra-

STATUTES—*Continued.*

vene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law will control. *S. v. Barksdale*, 621.

STATUTE OF FRAUDS.

1. *Frauds, Statute of—Debt of Another—Requisites of Promise—Contracts—Warranty.*—A telegram sent in good faith at the request of a debtor to his creditor that the former is reliable and that "any justifiable claims will be taken care of promptly," is insufficient to establish a contract of guaranty, or a promise to answer for the debt, default, or miscarriage of another, there being no promise to pay the debt if the debtor should not do so, but only an expression of opinion as to his responsibility concerning it. *Grocery Co. v. Early*, 459.

2. *Same—Principal and Agent—Undisclosed Transactions.*—Where the plaintiff has agreed with his debtor, over the long-distance telephone, to release a consignment of hay at his depot, if payment were guaranteed by a certain firm doing business there, the defendant in the action, whereupon, without knowledge of this agreement the defendant wired in good faith to the plaintiff, in effect, that the debtor was reliable and would promptly take care of "any justifiable claims": *Held*, the debtor was the plaintiff's agent for the purpose of communicating to the defendant the agreement made between them, and, there being no fraud or collusion, the defendant is not liable for the debt. *Ibid.*

STENOGRAPHER'S NOTES. See Appeal and Error, 50.

STREAMS. See Constitutional Law, 19, 21; Statutes, 6.

STREET RAILWAYS.

1. *Street Railways—Carriers of Passengers—Negligence—Status of Passenger.*—Whether one who has just alighted from a street car as a passenger ceases to be one immediately upon alighting, so as to cause the company's responsibility to cease, under the ordinary rule of its liability for the safety of its passengers, depends upon the apparent danger of the one so alighting under the conditions of danger and the surrounding circumstances which should have been observed by the company's employees in charge of the car, and the injury caused by their want of due care could reasonably have been prevented by them. *Loggins v. Utilities Co.*, 221.

2. *Same—Alighting from Car.*—Upon the question of the liability of a street car company to one who had just alighted from its car as a passenger, and had been run over and killed at a regular stopping place in a dangerous portion of a city, arising from traffic conditions on the street, the test is not whether the passenger had actually left the car and reached the street without injury, but whether the place was safe for him to have alighted, under the attending circumstances, there being a distinct difference between a safe landing and landing in safety, and the rule being that he retains his status as a passenger until he has stepped from the car to a place of safety on the street or highway. *Ibid.*

STREET RAILWAYS—*Continued.*

3. *Same—Transfer Points.*—Where the transportation of a passenger on a street car requires a transfer for him to reach his destination ordinarily, he is to be regarded as a passenger while making the change from the one car to the other as a part of the continuous trip, and to receive from the carrier's employees the same degree of care required for the protection of its passengers from injury. *Ibid.*

4. *Same—Evidence—Infants—Nonsuit—Questions for Jury—Trials.*—In an action to recover damages of a street car company for alleged negligence causing the death of the plaintiff's infant intestate, there was evidence tending to show that the intestate and his father, a carpenter, carrying his tools, became passengers on the defendant's car, requiring transfers to reach their destination, and forgetting their lunch basket, the intestate ran back, entered the car, got the lunch basket, the conductor opened the car door for him to alight, at a place of much traffic upon the street, and, just after alighting, an automobile struck and kill the intestate: *Held*, sufficient evidence of defendant's actionable negligence to take the case to the jury, and that the youth of the intestate, and the impulses or characteristics of boys of his age, in determining the relative rights and duties of the parties, will be also considered in passing upon defendant's motion as of nonsuit. *Ibid.*

STREETS. See Easements, 1; Municipal Corporations.

SUBSTANCE. See Instructions, 5.

SUDDEN PERIL. See Automobiles, 2.

SUICIDE. See Insurance, Life, 3.

SUMMONS. See Process, 1.

SUPERIOR COURTS. See Appeal and Error, 19, 20; Courts.

SUPPORT. See Criminal Law, 19.

SUPREME COURT. See Appeal and Error; Indictment, 1.

SURVIVORSHIP. See Wills, 18.

SURVIVAL OF ACTION. See Contracts, 6.

TAXATION. See Constitutional Law, 9, 17, 18, 22, 25, 28; Actions, 8.

1. *Taxation—Licenses—Automobiles—Cities and Towns—Municipal Corporations—Action to Recover—Statutes.*—To recover of a municipality the amount collected in excess of that allowed by law for an automobile tax, it is necessary to comply with an existing statute requiring that demand for a return thereof should have been made within a period therein prescribed. *Blackwell v. Gastonia*, 378.

2. *Same—Protest—Common Law.*—In order to recover money paid a municipality as a license tax in excess of the amount the town was lawfully authorized to collect, and in the absence of statutory regulations, or under the common law, it is necessary that the one so paying should have done so under protest at the time or under circumstances

TAXATION—*Continued.*

of duress or such as would endanger his person or property; and where the payment has been voluntarily made, the action may not be successfully maintained. *Ibid.*

3. *Taxation— Licenses— Payment Under Protest— Actions— Procedure— Statutes.*—In order to recover a license tax alleged to have been unlawfully demanded by a county, the taxpayer is required to pay the tax under a written protest, and make written demand upon the county treasurer within thirty days, and upon his failure to refund within 90 days the person so paying the tax may maintain his action against the county, including in his demand both the State and county taxes. C. S., 7919. *Brunswick-Balke Co. v. Mecklenburg,* 386.

4. *Taxation—Licenses—Mortgages—Liens—Priority.*—The lien of a license tax on a business is superior to that of a chattel mortgage on the property therein used, and the amount thereof is not abated by reason of an unexpired year. C. S., 7776-7786. *Ibid.*

TAX DEEDS. See Deeds and Conveyances, 2. 4.

TENDER. See Evidence, 6.

TERMS. See Constitutional Law, 31; Courts.

THREATS. See Homicide, 4.

TIMBER. See Contracts, 7; Deeds and Conveyances, 24, 26.

TIME. See Arbitration and Award, 1; Deeds and Conveyances, 26.

TITLE. See Vendor and Purchaser, 1; Counties, 1; Deeds and Conveyances, 24, 25, 32; Partition, 1; Appeal and Error, 37.

TOBACCO. See Warehousemen, 1.

TOLLS. See Constitutional Law, 4, 6.

TORTS. See Corporations, 1; Municipal Corporations, 1.

TRIAL BY JURY. See Reference, 1.

TRIALS. See Contracts, 1, 3; Evidence, 12, 14, 15, 18, 20; Libel and Slander, 2; Corporations, 2, 3; Appeal and Error, 1, 22, 23, 24; Betterments, 2; Carriers of Passengers, 1, 5; Street Railways, 4; Courts, 17, 18, 26; Constitutional Law, 35; Employer and Employee, 1; Carriers of Freight, 8; Intoxicating Liquors, 3, 20; Criminal Law, 14, 15; Homicide, 2; Insurance, Life, 3; Jury, 1.

1. *Trials—Homicide—Criminal Law—Mob Violence—Appeal and Error.*—The principle that a new trial will be granted in a criminal action where the conduct of a lawless mob, hostile to the prisoner, had direct bearing on the immediate conduct of the trial, and was of a kind or character intended and well calculated to distract the jury from intelligent, calm, and impartial consideration of the issues involved, has no application when, as under the facts of this case, it is made to appear that the cause was impartially heard and determined in a seeming and well-ordered manner, entirely unaffected by the futile

TRIALS—*Continued.*

action of the lawless element endeavoring to break into the jail and lynch the several defendants under indictment for murder in the first degree, and giving every assurance that the rights of the defendants, and each of them, were given full consideration. *S. v. Caldwell*, 519.

2. *Trials—Criminal Law—Severance—Court's Discretion.*—In criminal cases, as in this one, a trial of several defendants for the same homicide, it is within the sound discretion of the trial judge to permit or refuse defendants' motion for a severance, and it will not be reviewed in the absence of patent and gross abuse. *Ibid.*

3. *Trials—Evidence—Infants—Court's Discretion—Appeal and Error.*—Objection to the admission in evidence of the 11-year-old son of the deceased, on account of his youth and incapacity, etc., upon the trial of homicide, is to the sound legal discretion of the trial judge, which is not reviewable on appeal in the absence of patent or gross abuse. *Ibid.*

4. *Trials—Motions—Evidence—Nonsuit—Statutes—Criminal Law.*—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence, as the statute requires. *S. v. Helms*, 566.

TRESPASS.

Trespass—Evidence—Verdict—Appeal and Error.—Where a verdict is rendered upon conflicting evidence and without legal error of the court, it is conclusive on appeal. *Boone v. Newsome*, 501.

TRUSTS. See Evidence, 12; Mortgages.

1. *Trusts—Uses—Charitable Uses—Equity—Courts.*—A devise in trust of 300 acres of land used for years by the testator as a summer resort, in this case known as the Vade Mecum Springs, leaving it to the judgment of the trustee to develop it by suitable roads, to build a commodious and permanent auditorium for educational, religious and scientific, medical and other worthy organiations, and to develop the property "into not only a watering resort, but an institution after the order of a chautauqua," is held to be for charitable purposes and sufficiently definite as to the beneficiaries, and of stated purpose, to be carried out by the trustee, under the equitable jurisdiction of the courts when circumstances should hereafter require it, and the objection urged that the scheme lacked sufficient funds to carry it out, is held to be untenable under the facts in this case. *Trust Co. v. Ogburn*, 324.

2. *Same—Beneficiaries—Cy Pres.*—Where lands are devised in trust, with sufficient definiteness of purpose to be further developed for the charitable use of educational, religious, scientific, medical and other worthy gatherings, "and to develop the property not only into a watering resort, but into an institution after the order of a chautauqua," the discretionary power given to the trustee authorizes it to choose the beneficiaries, and develop the property for the stated purpose, under the supervision of a court of equity when applicable, and the doctrine of *cy pres* has no application. *Ibid.*

3. *Trusts—Uses—Charitable Uses—Sufficiency of Funds.*—Where the lands and certain funds are devised in trust to be developed for lawful

TRUSTS—*Continued.*

charitable uses in the discretion of the trustee as to detail, and the testator has sufficiently outlined the general plan, it is not required that the available funds should be adequate for the full design, but it may be applied by the trustee to a practical extent in its own judgment to carry forward the testator's desire as far as it will extend, under the equity jurisdiction of the courts when applicable. *Ibid.*

4. *Trusts—Charitable Trusts—Schools—School Districts—Counties—Board of Education.*—It appearing from the bequests in the will that the testator's principal purpose was to improve the public schools of his county, a devise in remainder of lands "for public school purposes," to "be cared for well and properly by the school committee of said district; manage it and apply the proceeds to keep the public school forever": *Held,* sufficiently certain in its terms to be sustained as a charitable trust, with the right, under the supervision of the board of education, to change the location of any schoolhouse, if for the best interest of those in the district. *Chandler v. Board of Education,* 444.

5. *Same—Statutes—Subdivision of Districts.*—Where a bequest of the rents or income from lands is sufficiently definite to sustain a charitable trust for public school purposes of a certain district under the supervision of the board of education, the trust is not impaired by the fact that, under a later law, the district was subdivided into other districts, for then the proceeds of the land must be apportioned among the new districts comprising the old one. *Ibid.*

6. *Same—Particular Schoolhouses.*—Where, during his life, a testator was actively interested in the public schools of his district, and has built, with the assistance of others, a schoolhouse therein, and dies, leaving by will the income of the remainder in certain lands for public school purposes of his district, without special reference to the schoolhouse he himself has built, an order requiring that the proceeds be applied to the maintenance of this particular schoolhouse alone is erroneous. *Ibid.*

TURNPIKES. See Constitutional Law, 2.

UNDUE INFLUENCE. See Deeds and Conveyances, 33.

USES. See Evidence, 12; Trusts, 1, 3.

VENDOR AND PURCHASER. See Bills and Notes, 1; Contracts, 4, 11, 15, 18.

1. *Vendor and Purchaser—Title Retained—Powers of Sale—Statutes—Foreclosure.*—A contract for the sale of personal property, retaining title in the vendor until the purchase price has been paid, without express power of sale therein, comes under the provisions of C. S., 2587, as if written in the contract, and gives to the vendor the right to sell the property in default of payment of the purchase price, or part thereof, without consent of court, upon certain advertisement specified in the statute; and it is reversible error for the court to charge the jury that the vendor could not sell the property without the consent of the purchaser. *House v. Parker,* 40.

2. *Vendor and Purchaser—Contracts—Breach—Performance—Time Extended—Waiver—Damages.*—Where the seller has breached his con-

VENDOR AND PURCHASER—*Continued.*

tract of sale and delivery of cotton yarns at a time specified, and there is evidence tending to show that for a certain length of time thereafter the parties regarded the contract in force for the delayed seller to fulfill his obligations thereunder: *Held*, the purchaser could waive the breach and extend the time of performance, and evidence of the price of the yarns at the expiration of the time extended, is competent upon the issue as to the measure of the plaintiff's damages, in his action to receive them. *Hosiery Co. v. Cotton Mills*, 140 N. C., 454, cited and applied as to the rule for the measure of damages and the facts of this case. *Cotton Mills v. Cotton Mills*, 73.

VENUE. See Actions, 3; Criminal Law, 17.

VERDICT. See Appeal and Error, 15, 28, 32, 37; Intoxicating Liquors, 4, 8; Carriers of Freight, 7; Criminal Law, 5; Deeds and Conveyances, 30; Trespass, 1; Jury, 2.

1. *Verdict—Doubtful Meaning—Appeal and Error.*—When, by reference to the pleadings, evidence, and the charge of the court, the true intent and meaning of the verdict of the jury is found doubtful, uncertain, and ambiguous, a new trial will be ordered on appeal. *Howell v. Pate*, 117.

2. *Verdict—Issues—Answers—Judgment.*—When the jury fail to answer issues as to the defendant's counterclaim, pleaded and with evidence to support it, and only find the issue as to plaintiff's demand in the affirmative, it is insufficient to support a judgment in plaintiff's favor, as impliedly answering the other issue against the defendant's claim. *Tire Co. v. Motor Co.*, 230.

3. *Verdict—Impeachment—Evidence.*—Evidence to impeach and set aside a verdict of a jury must be shown by other evidence than that of the jurors, or any of them, to be considered on appeal. As to the power of the court to set aside a verdict for cause after adjournment, see *S. v. Kinsauls*, 126 N. C., 1095, and other cases cited in the opinion. *S. v. Hall*, 527.

4. *Same—Appeal and Error—Findings.*—The trial judge should find the facts upon which he refuses to set aside a verdict for cause, on appellant's motion, or it will not be considered on appeal. *Ibid.*

VESTED RIGHTS. See Removal of Causes, 4; Constitutional Law, 3.

VOLSTEAD ACT. See Intoxicating Liquors, 5.

VOIDABLE DEEDS. See Deeds and Conveyances, 12, 13; Equity, 1.

WAIVER. See Criminal Law, 8; Libel and Slander, 4; Courts, 27; Bills and Notes, 3; Reference, 1, 2; Vendor and Purchaser, 2; Insurance, Life, 5; Insurance, Fire, 1; Homicide, 9; Constitutional Law, 33.

WAR. See Railroads, 1; Removal of Causes, 4, 5; Carriers of Freight, 3.

WAREHOUSEMEN.

1. *Warehousemen—Tobacco—Public Sales—Public Interests—Court's Jurisdiction.*—Tobacco warehouses are "affected with a public interest,"

WAREHOUSEMAN—*Continued.*

and the courts have jurisdiction over the question whether the exclusion by the owners of the warehouse of one offering to sell or buy tobacco therein is unlawful. *Gray v. Warehouse Co.*, 166.

2. *Same—Fraud—Deceit—Exclusion of Seller.*—The exclusion by the owners of one offering to sell his tobacco upon their warehouse floors is unlawful unless his conduct is contrary to the principles of honesty and fair dealing towards the warehousemen and purchasers upon the warehouse floor. *Ibid.*

3. *Same—Equity—Injunction.*—Where a tobacco warehouse company has refused to receive the seller's tobacco for sale upon its warehouse floor, for "nesting" it, or so packing it as to deceive bidders and give them a false impression of its real value, an order restraining the warehousemen will be granted and continued to the hearing at the suit of the seller when the plaintiff has made out a *prima facie* case entitling him to the relief sought. *Ibid.*

4. *Same—Boards of Trade—Rules and Regulations.*—While a board of trade of a town may make rules and regulations binding upon its members, and exclude persons from membership who violate them; this does not permit warehouses, by their rules and regulations, to exclude as sellers from offering leaf tobacco for sale on their warehouse floors, or from being buyers all persons who are not members of some prescribed organization. *Ibid.*

WARNINGS. See Railroads, 2, 3, 9.

WARRANTY. See Contracts, 20; Deeds and Conveyances, 27; Statute of Frauds, 1.

WATCHMAN. See Railroads, 5.

WATERS. See Evidence, 13.

WATER-WORKS. See Municipal Corporations, 1, 6.

WEAPONS. See Constitutional Law, 34.

WILLS. See Constitutional Law, 1; Deeds and Conveyances, 7; Estates, 1, 2; Limitation of Actions, 2; Statutes, 4; Courts, 15.

1. *Wills—Interpretation—Money on Deposit—Certificates of Deposit—Evidence.*—As to whether a certificate of deposit will pass under a bequest in a will of "money on hand," *Quere?* and: *Held*, this interpretation will not prevail when a contrary purpose is quite apparent; and evidence of the declaration of the testator of what he wanted done with the money in the bank, is incompetent. *Thomas v. Houston*, 91.

2. *Wills—Interpretation—Intent—Residuary Clause—Presumptions.*—The purpose of a residuary clause in a will is to embrace both real and personal property not therein specifically devised or bequeathed, and unless words are used to restrict its meaning, this interpretation will be adopted as carrying out the intent of the testator. *Allen v. Cameron*, 120.

WILLS—*Continued.*

3. *Same.*—A testator owning a large estate in real and personal property, after making devises and bequests thereof, and to provide for any omission, with apparent particularity declared his daughter the residuary legatee, "to receive and take all that shall be omitted, or shall fall in and become mine, either in law or equity, and that she shall be paid her full child's part on the division of my personal property, without deduction for any advances, as she has needed none and received nothing beyond what she deserved," etc.: *Held*, a lot of land not specifically devised comes within the terms of the residuary clause, and evidenced the testator's intent from the language employed as well as from the presumption of law, that as to the land specified he should not die intestate, and that the daughter should not be charged with any advancements whatsoever. *Ibid.*

4. *Same—Devise—Bequest—Realty—Personalty.*—The general rule of interpretation of a residuary clause in a will is that the word "legacy" may include "devise" and "legatee," a "devisee" applying to both the testator's realty and personalty when from the writing of the will the testator's intent so appears. *Ibid.*

5. *Wills—Holograph Wills—Unmailed Letters—Intent to Make a Will.*—A letter written and signed by the supposed testator must, to constitute his last will and testament, show that it was his intention that the paper istelf should operate as a disposition of his property, to take effect after his death; and when the letter propounded is found stamped and addressed in the pocket of the deceased after his death, etc., and refers to a conversation with the addressee as to the making of his will, saying he wanted the addressee to write it and the deceased would pay for it; and after saying how the estate was to be disposed of, that the writer would "be up town as soon as he got able," expresses merely an anticipated testamentary intent, and as a matter of law is not operative as a valid will. *In re Johnson*, 303.

6. *Wills—Interpretation—Intent.*—A will is construed as a whole to ascertain the intent of the testator, and, except as to the meaning of words and phrases of a settled legal purport, little help is to be derived from adjudicated cases owing to the usual dissimilarity of facts and expressions used. *Patterson v. McCormick*, 311.

7. *Same—Estates—Contingent Remainders.*—Upon a devise to two nephews (named) of the testator, an undivided one-half interest of certain land to each, but upon the contingency of the death of one of the named nephews, without issue, then to the other nephew and the heirs of A. and G.: *Held*, the nephews so named will be presumed to be the primary objects of the testator's bounty, nothing else appearing, and upon the death of one of them, without issue, one-half of the estate will go in fee to the other, having issue, and the half interest devised upon contingency to the deceased nephew will be divided into three equal parts, one part for the surviving nephew, having issue, and one part each to the heirs of A. and G., as the secondary object of the testator's bounty. *Ibid.*

8. *Wills—Letters—Animo Testandi—Signature—Holograph Wills.*—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying,

WILLS—*Continued.*

"Brother Richard, take care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house. . . . I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will, when our statute has been complied with relating thereto. *Wise v. Short*, 320.

9. *Wills—Devise—Heirs—Fee Simple.*—While a devise is to the testator's son, "to him and his heirs forever," passes a fee-simple title to him without the use of restrictive expression, it will not be so construed when it appears from the interpretation of other language used in the will that he was only to take a defeasible fee. *Hines v. Reynolds*, 343.

10. *Same—Defeasance—Issue—Children—Estates—Remainders.*—Where a devise is to the testator's son "and his heirs," followed by the words that in the event he should die "without heirs," then to the testator's daughter "and the heirs of her body," the word "heirs," used in connection with the son, evidences the testator's intent, from the relationship of the devisees, that it should mean issue or children of the son, and the words "bodily heirs," used in connection with the daughter, as issue or children of the daughter, and upon the happening of the contingency after the death of the daughter, her issue or children will take the fee-simple title, to the exclusion of the heirs general of the son dying without issue. *Ibid.*

11. *Same—Statutes—Descendible Interests.*—Under the provisions of Rules 1 and 10, C. S., 1654, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. *Ibid.*

12. *Wills—Devise—Estates—Remainders.*—Where the testator directs that two of his children, beneficiaries under his will, pay a certain sum of money to another of his children, and "no more," the intent of the testator is manifest that the other two children shall enjoy the remainder of the gifts to them. *Ibid.*

13. *Wills—Estates—Contingent Interest—Time of Happening of Contingency.*—A devise of lands to the testator's children depending upon their dying with issue, and in the event they should not leave issue to the heirs of the testator, is construed to take effect upon the death of the testator. *Baugham v. Trust Co.*, 406.

14. *Same—Beneficiaries—Heirs at Law—Relinquishment of Right—Fee Simple.*—Where the testator's children are his heirs at law, and a devise of lands is to them, and if any should die without issue to the heirs at law of the testator, the children of the testator may waive the condition by proper proceedings had among them all, and each acquire an indefeasible fee to a division of the lands among themselves. *Ibid.*

15. *Wills — Estates — Contingencies — Remainders—Reversion—Children—Heirs at Law—Division in Severalty—Relinquishment of Right—Fee.* Where the children of the testator are his heirs at law, and take by

WILLS—*Continued.*

will upon the contingency of their having children at the death of the testator, whether they take in remainder or a reversionary interest as the heirs of the testator, is immaterial upon the question of their right to apportion the lands by proper proceedings among themselves, and thus acquire a fee-simple title to the lands accordingly held by them in severalty. *Ibid.*

16. *Wills—Interpretation—Intent—Changed Condition of Estate.*—The primary rule of interpretation is to ascertain from the language of the will, construed as a whole, the intention of the testator in disposing of his estate, and this intent controls without any supposition as to what he would have done with his property under changed conditions. *Dicks v. Young*, 448.

17. *Wills—Interpretation—Intent—Ambiguity.*—Where, in expressing his intent, the testator uses in his will words that are free from ambiguity and doubt, no other meaning may be given than that plainly, clearly, and distinctly expressed by them. *Ibid.*

18. *Same — Survivorship — Children— Grandchildren—Estates—Contingent Limitations.*—A devise of lands to the testator's wife for life, and at her death to be equally divided among his four named children, "but if either of them shall die without leaving a child or children living at their death, then the portion of such child so dying shall go to the survivors of them and their heirs forever": *Held*, the words "survivors of them" refers to the survivor of the testator's own children, to the exclusion of grandchildren whose parents, named in the will, have previously died. *Ham v. Ham*, 168 N. C., 486, and other like cases cited and applied. *Ibid.*

19. *Wills—Devise—Estates—Per Stirpes—Intent.*—Nothing appearing in the will to the contrary, a devise to testator's wife of one-third of his lands for life, and at her death, "all of this property shall go to the heirs of N." and to "the bodily heirs of J." carries the land to the "heirs of N." and the "bodily heirs of J." upon the termination of the life estate devised to the wife, *per stirpes* and not *per capita*, where there are certain expressions in the will indicating that purpose; and this interpretation is especially applicable when construing the will as a whole, and in its connected parts, the language of the testator manifestly imports this intent. *Mitchell v. Parks*, 180 N. C., 634. This is to correct an inadvertence appearing in this case reported in a former volume and not appearing herein.

WITNESSES. See Courts, 1, 27; Deeds and Conveyances, 17; Evidence, 10.

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